83-345

No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

WILLIAM J. McCARTHY, ET AL.,
PETITIONERS,

v.

CHARLES D. BONANNO LINEN SERVICE, INC., ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented for Review.

1. Whether the conclusion of the Court of Appeals for the First Circuit, that the scope of the prohibitions set out in § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), includes union activity at a facility occupied solely by the primary employer if an object of the union's activity is to coerce third parties, is at variance with the holdings of this Court?

2. Whether the Court of Appeals for the First Circuit erred in interpreting 28 U.S.C. § 1441(b) as authorizing the severence and removal of a federal claim even though the non-removable state law claims from which the federal claim is severed are not "separate and independent" from the federal claim within the meaning of 28 U.S.C. § 1441(c)?

List of Parties to the Proceeding Below.

The plaintiff-appellee below was Charles D. Bonanno Linen Service, Inc.

The defendants-appellants were Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 25, William J. McCarthy, Herbert T. Salter, Gerald J. Halloran, Peter Forrest, Arthur Moran, Jack Kerwin, John O'Malley, Ernest Zimmerman and Joseph Caico.

The instant writ is submitted on behalf of Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 25.

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Citations to Opinions Below.

The decision of the United States Court of Appeals for the First Circuit is reported at 708 F.2d 1 (1st Cir. 1983), and is reproduced in Appendix A of this petition.

The Memorandum and Order of the United States Court of Appeals for the First Circuit, wherein the petition for rehearing and/or rehearing in banc was denied is unreported but is reproduced in Appendix B of this petition.

The decision of the United States District Court for the District of Massachusetts also is unreported but is reproduced in Appendix C of this petition.

Jurisdictional Statement.

The memorandum and order of the United States Court of Appeals for the First Circuit denying the timely-filed petition for rehearing and/or rehearing in banc was entered on June 1, 1983. This Court has jurisdiction over the instant petition pursuant to 28 U.S.C. § 1254(1).

Applicable Statutory Provisions.

The instant petition raises two issues. The first issue involves the scope of the restrictions on union conduct contained in § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), as made actionable in a federal forum by § 303 of the Labor-Management Relations Act, 29 U.S.C. § 187. More particularly, the first issue herein is whether the prohibitions of § 8(b)(4) include union activity, at the situs of the primary employer, that is intended to induce and/or coerce third parties to refuse to do business with the primary employer.

The second issue is a matter of general application and involves the meaning and application of the federal removal statute, 28 U.S.C. § 1441. Specifically, the second issue is whether the presence of non-removable, non-separate and non-independent claims in a single proceeding filed in state court operates as a bar to the removal of a federal claim in the same proceeding.

The texts of 29 U.S.C. §§ 158(b)(4) and 187 and 28 U.S.C. § 1441 are set out in Appendix D of this petition.

Statement of the Case.

On August 7, 1975, certain linen companies, including Charles D. Bonanno Linen Service, Inc.[1] (hereinafter, "Bonanno"), commenced an action in the Superior Court of the County of Suffolk in the Commonwealth of Massachusetts and named Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 25 (hereinafter, "Local 25" or "the union defendant") and certain of its officers and members (hereinafter, "the individual defendants") as party-defendants.[2] In their complaint, the linen companies alleged that they and Local 25 were engaged in a labor dispute as a result of the parties' inability to agree on the terms of a successor collective bargaining agreement. In addition, it was alleged that —

> 20. Defendants have indulged in numerous illegal acts of violence and/or threats of violence towards both Plaintiffs' property and employees, and towards third parties trying to do business with Plaintiffs, at Plaintiffs' respective places of business, including;
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> . . .
>
> (f) The valve of an oil truck was cracked open while parked at the Roxbury place of business of the Plaintiff, Standard, thereby causing approximately eight hundred gallons of heavy fuel oil to spill onto said Plaintiff's premises.
>
> . . .
>
> (h) Various third parties doing business with Plaintiffs have been threatened with physical violence by

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[1] The other companies were Federal National Linen Service Company, Independent Leasing Corporation, Loyal Crown Linen Service, Inc., Morgan Services, Inc., and Standard Linen Service.

[2] Named as individual party-defendants were William J. McCarthy, Herbert T. Salter, Gerald J. Halloran, Peter Forrest, Arthur Moran, Jack Kerwin, John O'Malley, Ernest Zimmerman and Joseph Caico.

pickets identified as linen supply drivers involved in the labor dispute and members of Local 25.

The acts set forth above and other acts of violence and/or threats of violence directed against Plaintiffs' property and employees, and against third parties doing business with Plaintiffs, at Plaintiffs' respective places of business, have been coincidental to the duration of the aforementioned strike and lockouts.

. . .

22. By reason of the number of persons from time to time engaged in the aforementioned picketing, as well as the manner in which such picketing is being conducted, and by reason of the acts of violence and threats of violence directed toward Plaintiffs' property and employees and against third parties doing business with Plaintiffs, Defendants have wilfully and intentionally attempted (a) to intimidate, coerce and hinder employees of the Plaintiffs in going to and from work, and (b) to interfere with the shipment and/or receipt of goods by Plaintiffs. As a result of the foregoing, certain employees of the Plaintiffs have in fact absented themselves from work, and certain suppliers of the Plaintiffs have refused to deliver supplies.

In their prayer for relief, the linen companies sought injunctive relief as well as damages for any losses suffered as a result of the disputed conduct.

On August 11, 1975, the union defendant and the individual defendants filed a petition for removal to the United States District Court for the District of Massachusetts, wherein they asserted that certain of the allegations contained in the complaint "appear to represent an attempt on the part of the

Plaintiffs to state a cause of action within the meaning of 29 U.S.C. § 187 of which this Court has original jurisdiction." The linen companies did not challenge the propriety of the removal petition but, rather, successfully moved in the district court for a preliminary injunction. *See Bonanno Linen Service, Inc.* v. *McCarthy*, 532 F.2d 189 (1st Cir. 1976).

On April 23, 1976, all the defendants and the linen companies other than Bonanno stipulated to the dismissal of the claims. Thereafter, the case lay dormant for three years, at which time the district court advised the parties that the case would be dismissed for want of prosecution. Subsequently, Bonanno advised the court that it wished to prosecute the damage claim but requested that the claim not go forward until the companion claim before the National Labor Relations Board was resolved. *See Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404 (1982).

During the Bonanno-requested delay, and more than a year and a half prior to the ultimate trial on the "merits," the union defendant and the individual defendants jointly moved to terminate the injunction and remand the action for want of jurisdiction. The district court, however, denied the motion. In addition, the individual defendants later moved to dismiss the claims against them prior to the commencement of trial. This motion was also rejected, and a trial was held during which only state law tort claims were pursued. Subsequent to the trial, the district court ruled that Local 25 and certain of the individual defendants were liable to Bonanno for certain expenses based on state tort law theories.

On appeal to the United States Court of Appeals for the First Circuit, the union defendant and the individual defendants renewed their jurisdictional claims. First, the union defendant argued that no federal claim under § 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, was stated on the face of Bonanno's complaint. Second, the in-

dividual defendants contended that it was error for the district court to assert "pendent-party" jurisdiction over them. Third, the individual defendants asserted that the claims against them were not properly removable under 28 U.S.C. § 1441(c), since same were not "separate and independent" from those alleged against Local 25. Finally, the union defendant argued that even if the complaint could be viewed as containing a claim under § 303, the district court had lacked jurisdiction, since such a claim was not properly severable from the non-removable, non-separate and non-independent claims against the individual defendants.

After briefing and argument, the United States Court for the First Circuit issued its decision. In that decision, the court agreed that the district court had lacked "pendent-party" jurisdiction over the claims against the individual defendants, especially in light of this Court's decision in *Complete Auto Transit, Inc.* v. *Reis*, 451 U.S. 401 (1981). In addition, the court concurred with the contention of the individual defendants that the asserted claims against them were not separate and independent from those alleged against the union defendant, Local 25. However, the court, citing the allegations set out above (¶¶ 20(f) and (h) and ¶ 22), ruled that Bonanno's complaint did state a claim under § 303. Moreover, the court concluded that it was permissible to sever and remove to federal court the § 303 claim and the pendent state law claims against Local 25, even though those claims were not separate and independent from the non-removable claims against the individual defendants.

Reasons for Allowing the Writ.

The decision of the United States Court of Appeals for the First Circuit is remarkable in two respects. First, its ruling

that Bonanno's complaint stated a claim under § 303 was premised expressly and solely on the belief that union activity at a facility occupied solely by the primary employer could constitute unlawful secondary activity if an object of the union's activity is to coerce third parties. As detailed below, this premise is fundamentally at variance with the decisions of this Court. Second, in an apparent ruling of first impression for a circuit court of appeals, the United States Court of Appeals for the First Circuit interpreted 28 U.S.C. § 1441(b) as authorizing the severance and removal of a federal claim even though the non-removable state law claims from which the federal claim is severed are not separate and independent from the federal claim. In so ruling, the court misconstrued § 1441(b) and, thereby, opened even wider the federal court's jurisdictional "backdoor."

I. The First Circuit's Conclusion Regarding the Scope of Actionable Conduct Under § 303 of the Labor-Management Relations Act is at Variance with Long-Standing Holdings of This Court.

The issue of the scope of actionable conduct under § 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, did not arise herein because a § 303 claim against Local 25 was pursued by Bonanno. Rather, since Bonanno litigated only state law tort claims against both Local 25 and the individual defendants, the issue of the scope of § 303 related solely to the threshold question of whether the federal court had jurisdiction to hear any claims in view of the allegations contained in Bonanno's complaint.

In this regard, it is well-settled that, for removal purposes, the necessary federal claim must appear on the face of the complaint and, therefore, the necessary elements thereof may

not be introduced through the petition for removal or other documents. *See, e.g., Phillip's Petroleum Co.* v. *Texaco, Inc.*, 415 U.S. 125, 127-128 (1974); *Gully* v. *First National Bank*, 299 U.S. 109, 113 (1936). Indeed, this was the standard by which the First Circuit Court of Appeals determined whether a federal claim was present for removal purposes. *See* 708 F.2d at 3-4.

In applying the standard, the First Circuit Court of Appeals considered the following allegations:

> 20. Defendants have indulged in numerous illegal acts of violence and/or threats of violence towards both Plaintiffs' property and employees, and towards third parties trying to do business with Plaintiffs, at Plaintiffs' respective places of business, including:
>
> . . .
>
> (f) The valve of an oil truck was cracked open while parked at the Roxbury place of business of the Plaintiff, Standard, thereby causing approximately eight hundred gallons of heavy fuel oil to spill onto said Plaintiff's premises.[3]
>
> . . .
>
> (h) Various third parties doing business with Plaintiffs have been threatened with physical violence by pickets identified as linen supply drivers involved in the labor dispute and members of Local 25.
>
> The acts set forth above and other acts of violence and/or threats of violence directed against Plaintiffs' property and employees, and against third parties doing business with Plaintiffs, at Plaintiffs' respective places of business,

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[3] Interestingly, while ¶ 20(f) was cited by the First Circuit Court of Appeals as describing unlawful secondary activity, there is no suggestion in the complaint that the "oil truck" belonged to a third party.

have been coincidental to the duration of the aforementioned strike and lockouts.[4]

Id. at 5.

In addition, the First Circuit Court of Appeals quoted the following portion of the complaint's conclusion:

> 22. By reason of the number of persons from time to time engaged in the aforementioned picketing, as well as the manner in which such picketing is being conducted, and by reason of the acts of violence and threats of violence directed toward Plaintiffs' property and employees and against third parties doing business with Plaintiffs, Defendants have wilfully and intentionally attempted (a) to intimidate, coerce and hinder employees of the Plaintiffs in going to and from work, and (b) to interfere with the shipment and/or receipt of goods by Plaintiffs. As a result of the foregoing, certain employees of the Plaintiffs have in fact absented themselves from work, and certain suppliers of the Plaintiffs have refused to deliver supplies.[5]

Id. With one exception,[6] the above-quoted allegations are the only ones that refer, in any way, to the impact of the strike activities on third parties.

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[4] While the First Circuit Court of Appeals did not quote the preface and conclusion to paragraph 20, it is evident that same are an integral part of language quoted.

[5] The First Circuit Court of Appeals, in quoting paragraph 22, included only the references to third parties. *See* 708 F.2d at 5.

[6] Paragraph 19 of the complaint provides that "[m]ass pickets consisting of members of Local 25 have obstructed the passage of oil trucks attempting to deliver oil to the Roxbury place of business of the Plaintiff, Standard Linen."

As is obvious from the above, the allegations regarding interference with third parties that were quoted and relied on by the First Circuit Court of Appeals expressly provide that the interference occurred "at Plaintiffs' respective places of business" and provide that this interference represented an intentional attempt "to interfere with the shipment and/or receipt of goods by Plaintiffs." Nevertheless, the First Circuit Court of Appeals ruled that these allegations state a claim under § 303. Thus, the court stated as follows: "Where *an object* of the union's activity is to coerce third persons, it can fall within the prohibitions of § 8(b)(4), depending on the precise nature of the picketing and the intent of the pickets." *Id.* (Emphasis in original.)

Stripped to its essence, the opinion of the First Circuit Court of Appeals provides that coercive conduct by the union against third parties attempting to do business with the primary employer can be violative of @8(b)(4) of the Natural Labor Relations Act, 29 U.S.C. § 158(b)(4), depending on the intent of the pickets, even if the situs of the dispute is solely occupied by the primary employer. As detailed below, this conclusion is at variance with the long-standing holdings of this Court. In addition, this conclusion significantly broadens the prohibition contained in § 8(b)(4) and, derivatively, expands federal jurisdiction under § 303 of the Labor-Management Relations Act.

In this regard, a substantial majority of the decisions of this Court regarding the dividing line between forbidden secondary activity and protected primary activity have involved common situs problems. *See, e.g., United Steelworkers* v. *NLRB*, 376 U.S. 492 (1964); *Local 761, International Union of Electrical Workers* v. *NLRB*, 366 U.S. 667 (1961). In the common situs decisions, this Court has indicated that the location of the picketing is not controlling but, rather, that what is controlling is whether the duties of the employees induced

and/or coerced were connected with the normal operations of the employer. *See, e.g., United Steelworkers* v. *NLRB, supra* at 497; *Local 761, International Union of Electrical Workers* v. *NLRB, supra* at 680-681.

In contrast, this Court has ruled that if the situs of the dispute is occupied solely by the primary employer the location of the picketing is controlling. Thus, in *United Steelworkers* v. *NLRB*, this Court stated the following:

> In this Court, the Board conceded that when the struck premises are occupied by the primary employer alone, the right of the union to engage in primary activity at or in connection with the primary premises may be given unlimited effect — "all union attempts, by picketing and allied means, to cut off deliveries, pickups, and employment at the primary employer's plant will be regarded as primary and outside the purview of section 8(b)(4)(A)."

376 U.S. at 497, *quoting* Brief for the National Labor Relations Board, *Electrical Workers Local 761* v. *Labor Board*, No. 321 (October term, 1960) at 31.

Accordingly, under established precedent, and contrary to the decision of the First Circuit Court of Appeals, the intent of picketers at the solely occupied premises of the primary employer is not relevant, since this Court has given the right to engage in such picketing unlimited effect by providing that same is *per se* outside the purview of § 8(b)(4).

As noted *supra*, the allegations cited by the First Circuit Court of Appeals in support of its conclusion that the complaint states a § 303 claim expressly provide that the alleged coercion of the third parties occurred at the situs of the

primary employers.[7] In addition, the complaint is devoid of any suggestion that the premises of the primary employers were shared with third parties. As such, the conclusion of the First Circuit Court of Appeals that a § 303 claim was stated and the concomitant determination that the district court had jurisdiction to hear the state law tort claims were fundamentally at variance with the express limitations placed by this Court on the prohibitions contained in § 8(b)(4) and, derivatively, on the scope of federal jurisdiction under § 303.

Moreover, even assuming, *arguendo*, that the instant complaint was construed as containing sufficient allegations to raise a common situs problem, the conclusion of the First Circuit Court of Appeals regarding the existence of a § 303 claim would still be inconsistent with the standards of this Court. In this regard, this Court, as noted above, focuses, in common situs disputes, on the nature of the duties of the third parties in relation to the operations of the primary employer. Thus, if the third parties are connected with the normal operations of the primary employer, the coercive conduct directed at them is considered to be outside the prohibition described in § 8(b)(4).

In ¶ 22 of the complaint herein, which is described by the First Circuit Court of Appeals as the conclusion for the complaint's allegations of unlawful conduct, the linen companies expressly allege that the union conduct directed at third parties was an "intentional" attempt "to interfere with the shipment and/or receipt of goods by Plaintiffs." As such, the complaint expressly provides that the affected third parties were involved in the normal operations of the primary employers,

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[7] For example, the preface to ¶ 20 of the complaint provides, in relevant part, that "Defendants have indulged in numerous illegal acts of violence and/or threats of violence . . . towards third parties trying to do business with Plaintiffs, at Plaintiffs' respective places of business . . . ." *See also*, the conclusion to ¶ 20 set out in the text of the instant petition, *supra*.

and, therefore, the complaint cannot be read to state a § 303 claim even under the common situs standards.

In sum, this Court has established the parameters of unlawful conduct under § 8(b)(4) of the Natural Labor Relations Act. However, the First Circuit Court of Appeals has ignored or misconstrued those standards by providing that picketing and other activity at the situs of the primary dispute may be violative of § 8(b)(4) depending on the intent of the strikers even though the situs of the dispute is solely occupied by the primary employer. By so ruling, the First Circuit Court of Appeals has expanded not only the § 8(b)(4) prohibitions but also the federal court's jurisdiction under § 303.

II. The United States Court of Appeals for the First Circuit Erred in Interpreting 28 U.S.C. § 1441(b) as Authorizing the Severance and Removal of a Federal Claim Even Though the Non-Removable State Law Claims From Which the Federal Claim is Severed are Not Separate and Independent From the Federal Claim Within the Meaning of 28 U.S.C. § 1441(c).

As noted *supra*, the individual defendants argued successfully before the First Circuit Court of Appeals that the district court had erred in exercising "pendent-party" jurisdiction over the state law claims asserted against them. *See* 708 F.2d at 8. In addition, the First Circuit Court of Appeals concluded that the state law claims against the individual defendants were "too closely related" to the claim against the union defendant to be considered "separate and independent" within the meaning of 28 U.S.C. § 1441(c) and, as such, were not removable under that subsection. *See id.* at 9. ("The question is whether [§ 1441(c)] helps Bonanno, and the answer is that it does not. Under the test of *American Fire & Casualty* v. *Finn*, [341 U.S.

6 (1951)] the state claim against the individuals is not 'separate and independent' from the other claims in the case; it is too closely related to those claims to satisfy *Finn's* requirements"). *See also id.* at 10. Nevertheless, the First Circuit Court of Appeals concluded that the claim against the union defendant was properly removed in that § 1441 permitted the severence and removal of a non-separate and non-independent federal claim. In particular, the court stated that the federal claim was removable under § 1441(b), which provides as follows:

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

In support of its conclusion, the court noted that the corresponding provision in the previous version of the removal statute had referred to "any suit of a civil nature;" and, citing *The Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), and *Galveston, Harrisburg & San Antonio Railway Co.* v. *Hall*, 70 F.2d 608 (5th Cir. 1934), the court asserted that under the predecessor statute the "arising under" defendant was permitted to sever and remove his non-separable claim. Finally, the court concluded that the revisors of the removal statute did not intend to alter this entitlement. *See* 708 F.2d at 11.

As detailed below, the court's interpretation of § 1441(b) is inconsistent with the principles of statutory construction generally applicable to the removal statute; is contrary to other federal decisions; and is premised on faulty analysis.

Moreover, as detailed finally below, the court's interpretation results in an expansion of federal jurisdiction at the expense of judicial economy.

First, it is well established that removal statutes are to be construed strictly, in recognition of the "Congressional purpose to restrict the jurisdiction of the federal courts on removal." *Shamrock Oil & Gas Corporation* v. *Sheets*, 313 U.S. 100, 108 (1941). The court herein, however, strains to make removable an entire class of cases that clearly not only are not removable under a strict construction of § 1441 but also are not removable under a commonsense reading of the statute. In this regard, the drafters of § 1441 established express standards for removal when otherwise removable and non-removable claims are joined in a single state law proceeding. Thus, § 1441(c) provides as follows:

> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

Since the drafters obviously were cognizant that removable and non-removable claims can be joined in a state action, and since the drafters of § 1441 expressly provided a standard for the removal of such joined actions, *i.e.*, when the otherwise removable and the non-removable claims are "separate and independent," it is unsound to infer, as the First Circuit Court of Appeals did herein, that implicit in § 1441(b) is an additional and more liberal standard for the removal of such joined actions.

Moreover, the First Circuit Court of Appeals, in ruling that Bonanno's claim against Local 25 alone was removable pursuant to § 1441(b), equated the terms "claim" and "cause of action," as used in § 1441(c), with the term "civil action," as employed in § 1441(b). In this regard, the court, in considering whether the district court had had jurisdiction to hear the claims against the individual defendants, unquestionably viewed Bonanno's assertions against Local 25 as a "claim" within the meaning of § 1441(c). Thus, the court stated the following:

> In the present case, the state claim against the individuals was based upon "an interlocked series of transactions," some of which were used to infer the federal claim. Plaintiffs' complaint alleged injuries arising out of a single, protracted strike, in which mass picketing and violence affected both Bonanno and third persons. Judging from the complaint, some of the individual instances of picketing and violence affected third parties within the scope of the Taft-Hartley Act. The "Taft-Hartley" instances comprise a portion of the "state law" instances; and all instances are connected and intertwined. The "claim or cause of action" against the individuals thus fails to meet the "separate and independent" test of *Finn*, *see* 341 U.S. at 16, 71 S.Ct. at 541, for both claims "substantially derive from the same facts."

708 F.2d at 10, *quoting New England Concrete Pipe Corporation* v. *D/C Systems of New England*, 658 F.2d 867 (1st Cir. 1981).

In addition, the court, in ruling that the district court had jurisdiction to hear Bonanno's "claims" against Local 25, stated, in part, as follows:

> We note one final, related jurisdictional matter in respect to § 1441(b). That section allows removal of "any *civil action*" of which the district courts have original jurisdiction. . . . We conclude that it is proper here for the Local to remove Bonanno's "arising under" and pendent claims against it to federal court, even if the other state claim defendants must be left behind.

Id. at 11 (emphasis in original).

Accordingly, it is evident that the court's conclusion, that § 1441(b) authorizes the severence and removal of a federal claim even if the non-removable state law claims from which the federal claim is severed are not "separate and independent," is based on its belief that the terms "claim" and "cause of action" in § 1441(c) are synonymous with the term "civil action" in § 1441(b).

It is clear, however, that the plain or common meanings of these terms are not the same. Thus, using the terms' common or plain meanings, it is evident that Bonanno's complaint constitutes a single "civil action" in which there are multiple "claims." Given that the drafters of § 1441 did not provide special definitions for such terms as "civil action" and "claim," same should be afforded their ordinary meanings, especially when to do so would further the statutory construction principle generally applicable to § 1441.

Second, while the court below appears to be the first circuit court of appeals to address the question of whether a federal claim can be severed and removed to federal court from non-separate and non-independent state law claims, at least one federal district court has answered the question in the negative. In this regard, in *Austin* v. *General American Life Insurance Co.*, 498 F. Supp. 844 (N.D. Ala. 1980), plaintiff, on behalf of his son, commenced a three count action in state

court. Count I sought payment of medical costs incurred by the son from the defendant insurer under a group insurance program provided through plaintiff's employer. Counts II and III named defendant Phillips as an agent of the insurer and included estoppel and misrepresentation claims.

The defendants removed the case to federal court, asserting that Count I arose under the Employee Retirement Income Security Act of 1974 (ERISA), and the plaintiff challenged the removal. For purposes of determining whether removal was appropriate, the court presumed that Count I stated a claim against the insurer under ERISA.[8] The court concluded, however, that since the counts were not "separate and independent," and since Counts II and III were state law claims, the entire case was non-removable. In this regard, the court stated as follows:

> It is also important to note that, aside from the question of whether federal jurisdiction exists to consider claims of breach of contract provided under an ERISA plan, Count II and Count III being for estoppel and misrepresentations are not actions to enforce or establish rights provided by an ERISA plan. Therefore no basis for jurisdiction would exist as to these counts unless claims against such an insurer are necessarily subject to "ERISA jurisdiction." *Moreover, Count I cannot be removed independently of the claims under Count II and III.* . . .
>
> The defendants present no evidence to the effect that General American is charged with review of denied claims or is otherwise accountable as a fiduciary under ERISA. *As Counts II and III are not subject to federal*

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[8] In *dicta*, the court noted that, in its opinion, Count I did not state a claim under ERISA. *See* 498 F. Supp. at 846.

> *court jurisdiction, and cannot be separated under Finn from Count I, it follows that the case is due to be remanded.*

Id. at 846 (emphasis added).

Consistent with the *Austin* decision but at variance with the opinion of the court below, the district court in *Southland Corp.* v. *Estridge*, 456 F. Supp. 1296 (C.D. Ca. 1978), clearly indicated that in its view "arising under" claims were non-removable prior to the enactment of § 1441(c), if same were joined with a claim against a non-diverse party. Thus, the court noted the following:

> When Congress replaced the separable controversy provisions of 28 U.S.C. § 71 with § 1441(c), it removed the requirement that separable controversies could be removed only on the basis of diversity jurisdiction; under Section 1441(c), "separate and independent claim[s] or cause[s] of action" can be removed upon the basis of federal question jurisdiction. *See* Hart & Wechsler, *The Federal Courts in the Federal System*, 1211 (2d ed. 1973). Thus it is no longer possible for a plaintiff to join a non-diverse party to his federal question lawsuit against defendant in state court in order to prevent removal by the defendant; if the defendant can show that the claim against him is "separate and independent," he can remove.

Id. at 1300 n.6.

Accordingly, the conclusion of the First Circuit Court of Appeals is inconsistent not only with the accepted, relevant statutory construction principle but also the decisions of at least two federal district courts.

Third, as noted above, the conclusion of the First Circuit Court of Appeals that the district court had jurisdiction to hear only the claim against Local 25 is premised solely on its belief that that claim could have been severed and heard by a federal court under the predecessor to § 1441, 28 U.S.C. § 71, as same was interpreted by this Court in *The Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), and by the Fifth Circuit in *Galveston, Harrisburg & San Antonio Railway Co.* v. *Hall*, 70 F.2d 608 (5th Cir. 1934). The court's premises is clearly defective.

In this regard, *The Pacific Railroad Removal Cases* involved consolidated appeals, each of which raised an issue relating to the removal of causes from state courts. The appeal cited by the court below as support for its holding that it was permissible to sever from state law claims and remove a non-separate and non-independent federal claim involved the Union Pacific Railway Company and a dispute arising out of the widening of certain streets in Kansas City. In that case, the removal of the railroad's state law appeal under a Kansas City statute involving procedure for compensating landholders in the event of public takings was challenged based on the fact that all state law appeals involving the same taking could be consolidated by the state court into a single proceeding under the applicable statute.[9]

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[9] This Court described the issue as follows:

> A more embarrassing question arises under the third objection raised by the defendant in error, to wit, that the whole case relating to the widening of the street was carried before the Circuit Court of Jackson County by the appeal, and must also be carried to the Circuit Court of the United States in the same condition if the application for a removal is sustained, whereby the latter court will be called upon to exercise administrative functions of a local character to which it is incompetent.

115 U.S. at 19.

The court, in response to this challenge, reviewed the procedures under the applicable state law. Based on its review, the court noted that the railroad had filed a separate appeal; that that appeal involved a controversy "distinct and separate" from other appeals pending as a result of the same taking; and that, while all the appeals might be heard in a single state law proceeding, the state court could order a separate trial on the railroad's appeal.[10] In light of the above, the court concluded that the railroad's appeal was "to all intents and purposes a suit" within the meaning of the removal statute and, as such, could be removed to federal court. 115 U.S. at 23.

As detailed above, it is evident that the Court's reasoning in *The Pacific Railroad Removal Cases*, if applied to the instant dispute, compels a result contrary to that established by the court below. Thus, the court, in permitting removal in *The Pacific Railroad Removal Cases*, relied on the fact that the railroad had taken a separate appeal, that that appeal might

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[10] Specifically, the court noted the following:

> What, then, is the relation in which the railway company, as an appellant, stands towards the city of Kansas in this litigation? Clearly, it has two distinct issues, or grounds of controversy; first, the value of its property taken for the street; secondly, the amount of benefit which the widening of the street will create to its remaining property, not so taken. It may have a third issue, and, judging from the course of the argument, it has a third issue, still more important to it than either of the others, to wit, the right of a city to open a street at all across depot grounds. Now this controversy involving these three issues, is a distinct controversy between the company and the city. It may be settled in the same trial with the other appeals, and by a single jury; but the controversy is a distinct and separate one, and is capable of being tried distinctly and separately from the others. If the State Circuit Court had equity powers, it might direct a separate issue for the trial of this controversy by itself. It might try the other appeals without a jury (the parties waiving a jury), and try this controversy by a jury.

115 U.S. at 22-23.

be heard separately by the state court and that the underlying controversy was separate and distinct from the controversies underlying the other appeals. In contrast, in the instant case there was no separate suit commenced against Local 25. Moreover, since all defendants were properly joined by the linen companies, and since the claims were intertwined, the state court could not not have severed the claim against Local 25 from the claims against the individuals. Finally, the First Circuit Court of Appeals itself found that the claim against Local 25 was "intertwined" with those against the individual defendants.

In sum, the Court in *The Pacific Railroad Removal Cases* carefully sculptured a response to what the Court itself termed an "embarrassing question." *Id.* at 19. As such, the Court surely did not establish the general proposition relied on by the court below. Indeed, the Court's analysis in *The Pacific Railroad Removal Cases* undercuts the court's conclusion herein.

The First Circuit Court of Appeals also cited *Galveston, Harrisburg & San Antonio Railway Co.* v. *Hall*, 70 F.2d 608 (5th Cir. 1934), for the proposition that under the predecessor removal statute each "cause of action" represented a separate "suit" for removal purposes. In that case, the plaintiff had sued the railroad, as a common carrier, for the negligent killing of a number of his cattle. The railroad brought a cross-action against the county claiming breach of contract as a result of the county's maintenance of the stock pen. After the cross-action was filed, plaintiff amended his complaint to allege that the cattle had been shipped in interstate commerce. Thereafter, the railroad company removed the case to federal court, including its cross-section against the county.

On appeal, the court noted that the action and cross-action were "distinct in parties and subject matter." *Id.* at 610. As a result, the court concluded as follows: "When removability was first disclosed by amendment, although the railroad com-

pany then had a right to remove, it could be done only by abandoning its impleading of the county in state court." *Id.* While the above conclusion suggests that the case was improperly removed, the court permitted, without analysis, the judgment against the railroad to stand and simply ordered the cross-action dismissed.

As described above, *Galveston, Harrisburg & San Antonio Railway* v. *Hall* does not support the First Circuit Court of Appeals' contention that a non-separate and non-independent federal claim was severable from state law claims and removable under the predecessor to the removal statute. Indeed, the holding of that case is directly contrary to the court's contention herein. Moreover, to the extent the holding in *Galveston, Harrisburg & San Antonio Railway Co.* v. *Hall* is at variance with the result in that case, *i.e.*, removal of case against railroad permitted even though railroad had not first abandoned its cross-action against the county, the result reflects the fact that there were two cases or "suits," one between the plaintiff and the railroad and one between the railroad and the county, rather than one case containing claims by plaintiff against both the railroad and the county. Accordingly, the analysis of the First Circuit Court of Appeals is fundamentally flawed in that the cited decisions do not stand for the proposition that, under the predecessor to § 1441, each claim by plaintiff against a defendant or defendants was a separate "suit" for removal purposes.

Fourth, there can be no dispute that the court's holding below expands federal jurisdiction in that it creates a new class of cases that may be removed. Such an expansion of jurisdiction is particularly troublesome, given that the expansion is made at the expense of judicial economy. In this regard, § 1441(c) permits, at the discretion of the federal court, the severance of a federal claim from its state law counterparts. However, severance is permitted only if the claims are

separate and independent. This "separate and independent" requirement insures that the state and federal courts will not be, in effect, trying the same case should severance be permitted. In contrast, the holding of the court herein requires that the state and federal courts concurrently try the same case, albeit against different named defendants. As such, the First Circuit Court of Appeals has frustrated the goal of judicial economy, while at the same time creating the potential for inconsistent results.

Conclusion.

For the reasons set out in detail below, Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No 25 respectfully urges that this Court grant the instant writ.

Respectfully submitted,

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Dated:

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Appendix A.

CHARLES D. BONANNO LINEN SERVICE, INC., et al.,
Plaintiffs, Appellees,
v.
William J. McCARTHY, et al.,
Defendants, Appellants.

No. 82-1755.

United States Court of Appeals,
First Circuit.

Argued Feb. 3, 1983.
Decided May 9, 1983.

As Modified on Denial of Rehearing and Rehearing En Banc June 1, 1983.

The United States District Court for the District of Massachusetts, Robert E. Keeton, J., awarded a linen company compensatory damages on a state law tort claim against union and individual union members, in an action that had been removed from state court. The Court of Appeals, Breyer, Circuit Judge, held that: (1) complaint presented sufficient allegation that linen company was an industry affecting interstate commerce; (2) linen company alleged facts sufficient to present federal question; (3) there was no abuse of trial court's discretion in denying union's motion for remand; (4) federal court lacked jurisdiction to hear linen company's state claim against individual union members; (5) it was proper for union to remove linen company's claims arising under federal law and pendent claims to federal court, even if it was necessary to leave other state claim defendants behind; (6) there was sufficient evidence that union's representative participa-

ted in threats and acts of violence as required to hold union responsible for acts of its members; (7) there was adequate support for award to linen company of protective services for 1976 against union; (8) linen company could recover for expense of putting armed guards on its delivery trucks; and (9) district court properly awarded prejudgment interest for damages which accrued after action was filed.

Affirmed in part, and reversed in part with instructions.

1. **Removal of Cases — 25(1)**

Allegation that secondary boycott's ultimate target is an industry affecting interstate commerce is sufficient, for removal purposes, given factual likelihood that in most cases what affects innocent target will affect ultimate target, and given Congress' intent in Taft-Hartley Act to exercise its constitutionally granted commerce power broadly. Labor Management Relations Act, 1947, §§ 1 et seq., 303, as amended, 29 U.S.C.A. §§ 141 et seq., 187; National Labor Relations Act, § 8(b)(4), as amended, 29 U.S.C.A. § 158(b)(4).

2. **Removal of Cases — 25(1)**

Necessary "interstate commerce" allegations, namely that both secondary boycott's ultimate target, plaintiff linen company, and its innocent targets were in industry affecting interstate commerce, were sufficiently alleged in complaint, even though words "interstate commerce" did not themselves appear in the complaint, where state complaint alleged that parties held "four meetings with the Federal Mediation and Conciliation Service," which was available by statute only "in any industry affecting [interstate] commerce" where dispute "threatens to cause a substantial interruption of commerce." Labor Management Relations Act, 1947, §§ 1 et seq., 203(b), 303, as amended, 29 U.S.C.A. §§ 141 et seq., 173(b), 187; National Labor Relations Act, § 8(b)(4), as amended, 29 U.S.C.A. § 158(b)(4).

3. Federal Courts — 16

Allegations amounting to claim that union and its members tried to "threaten, coerce or restrain" third parties, to induce them to "cease doing business with" plaintiff linen companies set out "substantial" Taft-Hartley claim, and therefore, federal court had discretionary power to hear pendent state claim linked to federal claim by "common nucleus of operative fact." Labor Management Relations Act, 1947, § 303, as amended, 29 U.S.C.A. § 187; National Labor Relations Act, § 8(b)(4), as amended, 29 U.S.C.A. § 158(b)(4).

4. Federal Courts — 14

Exercise of discretion to hear state claim is governed by considerations of judicial economy, convenience and fairness to litigants.

5. Removal of Cases — 106

District court did not abuse its discretion in refusing to remand linen companies' action against union and its members alleging Taft-Hartley violations, where it was local itself that had removed action from state to federal court in the first place and there was no indication that linen companies lacked good faith in making their initial Taft-Hartley allegations. Labor Management Relations Act, 1947, § 303, as amended, 29 U.S.C.A. § 187.

6. Federal Courts — 16
Removal of Cases — 102

Court lacked pendent party jurisdiction over individual union members on state tort claims related to Taft-Hartley claims against union, and removal statute did not provide basis for jurisdiction which would otherwise be lacking. Labor Management Relations Act, 1947, § 303, as amended, 29 U.S.C.A. § 187; 28 U.S.C.A. § 1441.

7. Removal of Cases — 11

It was proper for union to remove linen company's claims arising under federal law and pendent claims to federal court, even if it was necessary to leave other state claim defendants behind. 28 U.S.C.A. § 1441.

8. Labor Relations — 766

There was sufficient evidence that union's representative participated in threats and acts of violence as required to hold union responsible for acts of its members. Norris-LaGuardia Act, § 6, 29 U.S.C.A. § 106.

9. Labor Relations — 766

Record showing many instances of violence before 1976 and at least eight instances during that year provided adequate support for award to linen company of costs for protective services for 1976 against union.

10. Negligence — 76

Under Massachusetts law, violation of law is bar to recovery only in instances where it is contributing cause to injury. M.G.L.A. c. 147, § 30, subd. 8.

11. Labor Relations — 768

Assuming linen company violated Massachusetts law by putting armed guards on its delivery trucks, employer could recover that expense from union, since there was no relation between the "illegality" and the expense, in that employer had to pay for the guards, not their weapons. M.G.L.A. c. 147, § 30, subd. 8.

12. Interest — 56

Under Massachusetts law, court is to add interest on entire amount of verdict. M.G.L.A. c. 231, § 6B.

13. Interest — 39(2)

Under Massachusetts law, district court properly awarded prejudgment interest for damages which accrued after action was filed. M.G.L.A. c. 231, § 6B.

James T. Grady, Boston, Mass., with whom Gabriel O. Dumont, Jr. and Grady, Dumont & Dwyer, Boston, Mass., were on brief, for defendants, appellants.

Howard I. Wilgoren, Boston, Mass., with whom Lepie, Coven & Wilgoren, Boston, Mass., was on brief, for Charles D. Bonanno Linen Service, Inc.

Before BOWNES and BREYER, Circuit Judges, and WYZANSKI,* Senior District Judge.

BREYER, Circuit Judge.

The district court awarded Bonanno Linen Service compensatory damages on a state law tort claim against Teamsters Union Local 25 and several individual Local members. The Local and the individual defendants appeal, raising several jurisdictional questions and also attacking the award on the merits. We agree with the jurisdictional argument of the *individual* defendants and vacate the judgment against them. As to all other matters, we affirm the judgment of the district court.

I

This case began in 1975 in the midst of a labor dispute between Bonanno, several other linen companies and the defendants. The companies brought suit in state court, alleging that the Local and some of its members had engaged in "numerous illegal acts of violence" and "threats of violence

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* Of the District of Massachusetts, sitting by designation.

toward both Plaintiffs' property and employees, and toward third parties trying to do business with Plaintiffs." They sought an injunction and damages.

A few days after the suit was filed, all of the defendants petitioned for its removal to the Massachusetts federal district court. In their petition, the defendants stated that the plaintiffs' complaint in part alleged a violation of a federal law, the Labor-Management Relations Act (LMRA, or Taft-Hartley Act) § 303, 29 U.S.C. § 187, which grants relief to those harmed by an illegal secondary boycott. *See* 29 U.S.C. § 158(b)(4).

The companies did not oppose the removal. Rather, they asked for a federal injunction. They obtained a temporary restraining order prohibiting further violence. *See Charles D. Bonanno Linen Serv., Inc. v. McCarthy*, 532 F.2d 189 (1st Cir. 1976). In April 1976, all of the companies but Bonanno voluntarily dismissed their claims. The case then lay dormant until 1979, when Bonanno announced its intention to proceed with its damage claim, once the National Labor Relations Board resolved a related unfair labor practice charge. *See NLRB v. Charles D. Bonanno Linen Serv., Inc.*, 630 F.2d 25 (1st Cir. 1980), *aff'd*, 454 U.S. 404, 102 S.Ct. 720, 70 L.Ed.2d 656 (1982).

In April 1980, the Local moved to remand the case to the state court, claiming lack of federal jurisdiction. The district court denied the motion in September. One year later, the individual defendants made a similar motion, which was quickly denied. Trial began on September 24, 1981. It focused almost exclusively on the state claims. In fact, the district court found for defendants on the federal secondary boycott claim, but it found for the plaintiffs on the state tort claims against both the Local and three individual members. The court ordered the defendants, who were held jointly and severally liable, to reimburse Bonanno for its expenses in protecting its

employees, to pay the medical expenses of an injured employee, and to pay the cost of certain other repairs. The court also awarded prejudgment interest from the date the original action was filed.

II

a. We turn first to a jurisdictional problem which this court itself raised at oral argument. We noted that this case was removed on the ground that Bonanno asserted a claim arising under federal law. *See* 28 U.S.C. § 1441. We also pointed to the case law requiring that the elements of the federal claim appear on the face of the state court complaint, without reference to other documents, such as the removal petition or the answer. *E.g.*, *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127-28, 94 S.Ct. 1002, 1003-1004, 39 L.Ed.2d 209 (1974); *Gully v. First National Bank*, 299 U.S. 109, 113, 57 S.Ct. 96, 98, 81 L.Ed. 70 (1936); *Brough v. United Steelworkers of America*, 437 F.2d 748, 749 (1st Cir. 1971). And we asked where, on the face of the state complaint, we could find the necessary "interstate commerce" allegations, namely that both the secondary boycott's ultimate target (Bonanno) and its innocent targets were in an "industry affecting [interstate] commerce." 29 U.S.C. §§ 158(b)(4), 187.

[1,2] Given the factual likelihood that in most cases what affects the innocent target will affect the ultimate target, and given Congress' intent in the Taft-Hartley Act to exercise its constitutionally-granted commerce power broadly, *Groneman v. International Bhd. of Elec. Workers*, 177 F.2d 995, 997 (10th Cir. 1949); *cf. NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), an allegation that *Bonanno* is "in an industry affecting [interstate] commerce" is sufficient. We are willing, for removal purposes, to presume this to be an adequate allegation of the rest. *See Her-*

bert Burman, Inc. v. Local 3, Int'l Bhd. of Elec. Workers, 214 F.Supp. 353 (S.D.N.Y. 1963). *Cf. Tucci v. International Union of Operating Engineers*, 316 F. Supp. 1127 (W.D.Pa. 1970). *See also Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

We reach this result without holding, as some courts have done, that one may look outside the state complaint to the removal petition for matters related to parties' "status" (such as this type of jurisdictional "commerce" nexus). *E.g., Hayes v. National Con-Serv, Inc.*, 523 F. Supp. 1034, 1037 (D.Md. 1981); *Ulichny v. General Electric Co.*, 309 F. Supp. 437, 440 (N.D.N.Y. 1970); *Geo D. Roper Corp. v. Local Union No. 16*, 279 F. Supp. 717 (S.D. Ohio 1968); *Fay v. American Cystoscope Makers, Inc.*, 98 F. Supp. 278, 280 (S.D.N.Y. 1951); *see* Wright, Miller & Cooper, *Federal Practice & Procedure* § 3722 at 561-64, § 3734 at 736 (1976). *But see La Chemise LaCoste v. Alligator Co.*, 506 F.2d 339, 344-45 (3d Cir. 1974), *cert. denied*, 421 U.S. 937, 95 S.Ct. 1666, 44 L.Ed.2d 94 (1975). Nor need we take "judicial notice" of the uncontested fact (as mentioned in the removal petition) that interstate commerce is here involved. *Cf. Lang v. American Motors Corp.*, 254 F. Supp. 892 (E.D. Wis. 1966) ("judicial notice" that American Motors is in an industry affecting commerce). We need only engage in a little statutory logic.

The state complaint alleges that the parties held "four meetings with the Federal Mediation and Conciliation Service." This federal service is available by statute only "in any industry affecting [interstate] commerce" where the dispute "threatens to cause a substantial interruption of commerce." 29 U.S.C. § 173(b). Thus, the necessary jurisdictional impact is ascertainable from the face of the complaint (without looking to the removal petition), even though the words "interstate commerce" do not themselves appear in the complaint. *See Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S.

738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) (complaint alleging impact on out-of-state purchases, revenues, and payments sufficient to establish jurisdiction). We see no reason to require more than this technical response to this technical jurisdictional matter. *Cf. Sheeran v. General Electric Co.*, 593 F.2d 93, 96 (9th Cir.) (employee's complaint did not refer to the collective bargaining agreement, but did refer to a pension contract which was an integral part of that agreement), *cert. denied*, 444 U.S. 868, 100 S.Ct. 143, 62 L.Ed.2d 93 (1979).

b. The Local argues that the plaintiff's assertion of a federal claim was inadequate for another reason, namely that the state complaint failed to set out the substantive elements of a Taft-Hartley § 303 violation. The district court disagreed with the Local, and so do we.

[3] The issue is whether the state complaint set out a "substantial" Taft-Hartley claim. If so, the federal court had discretionary power to hear a pendent state claim linked to the federal claim by a "common nucleus of operative fact," *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). The Supreme Court has made clear that "substantial" in this context means no more than not "so insubstantial, implausible, foreclosed by prior decisions . . . or otherwise completely devoid of merit as not to involve a federal controversy . . . ." *Hagans v. Lavine*, 415 U.S. 528, 543, 94 S.Ct. 1372, 1382, 39 L.Ed.2d 577 (1974); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666, 94 S.Ct. 772, 776, 39 L.Ed.2d 73 (1974); *accord, Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105-06, 53 S.Ct. 549, 550, 77 L.Ed. 1062 (1933). The language of the state complaint — to which we look to determine the court's power, *Gibbs*, 383 U.S. at 727, 86 S.Ct. at 1139 — meets this test.

The Taft-Hartley Act provides for a federal cause of action against labor organizations which engage in activity prohibited by § 8(b)(4), which makes it illegal

> to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is . . .
> (B) forcing or requiring any person to cease . . . doing business with any other person . . . *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
>
> . . . . . .
>
> *Provided*, that nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer . . . if the employees of such employer are engaged in a strike . . . .

29 U.S.C. § 158(b)(4)(ii). In enacting this language, Congress sought to prevent all "labor efforts to draw in neutral employers through pressure calculated to induce them to cease doing business with the primary employer." *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 624, 87 S.Ct. 1250, 1258, 18 L.Ed.2d 357 (1967); *see Local 761, Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667, 673-74, 81 S.Ct. 1285, 1289-90, 6 L.Ed.2d 592 (1961). And, in interpreting the Act, the Supreme Court has written that a union may not, for example,

> exercise coercive pressure upon [complainant's] customers, . . . in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it.

National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. at 621-22, 87 S.Ct. at 1256 (quoting *Duplex Printings Press Co. v. Deering*, 254 U.S. 443, 446, 41 S.Ct. 127, 176, 65 L.Ed. 349 (1921)).

The plaintiff's state complaint, in relevant part, fits within the Act's prohibitions. It alleges that

> (f) The valve of an oil truck was cracked open while parked at the Roxbury place of business of the Plaintiff, Standard, thereby causing approximately eight hundred gallons of heavy fuel oil to spill onto said Plaintiff's premises.
>
> . . . . . .
>
> (h) Various third parties doing business with Plaintiffs have been threatened with physical violence by pickets identified as . . . members of Local 25.

And the complaint concludes that

> By reason of . . . the acts of violence and threats of violence directed toward Plaintiffs' property and employees and against third parties doing business with Plaintiffs, Defendants have wilfully and intentionally attempted . . . (b) to interfere with the shipment and/or receipt of goods by Plaintiffs. As a result of the foregoing . . . certain suppliers of the Plaintiffs have refused to deliver supplies.

These allegations amount to a claim that the defendants tried to "threaten, coerce or restrain" third parties, to induce them "to cease doing business with" the plaintiffs.

The Union points to the provisos in § 8(b)(4). The first states that § 8(b)(4) does not "make unlawful, where not otherwise unlawful, any primary strike or primary picketing." The second specifies that lawful picketing is not made unlawful when third persons choose to honor the picket lines. The mere existence of picketing, however, does not automatically render all union activity lawful. *See United Steelworkers*

v. NLRB, 376 U.S. 492, 84 S.Ct. 899, 11 L.Ed.2d 863 (1964); *International Union of Elec. Workers v. NLRB, supra*; *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 71 S.Ct. 961, 95 L.Ed. 1277 (1951). Where *an object* of the union's activity is to coerce third persons, it can fall within the prohibitions of § 8(b)(4), depending on the precise nature of the picketing and the intent of the pickets. *See, e.g., NLRB v. Enterprise Ass'n of Pipefitters, Local 638*, 429 U.S. 507, 510 (1977); *NLRB v. Denver Building Council*, 341 U.S. 675, 689 (1951); *United Scenic Artists, Local 829 v. NLRB*, 655 F.2d 1267, 1269-70 (D.C. Cir. 1981); *Texas Distributors, Inc. v. Local Union No. 100*, 598 F.2d 393, 400 (5th Cir. 1979); *Iodice v. Calabrese*, 512 F.2d 383, 388 (2d Cir. 1975). Here, Bonanno has alleged that the Union *intended* to *coerce* third persons into ceasing to do business with it, and it has alleged damage to the property of third persons. The determination of whether certain activity is primary or secondary can often be made only after exploration of the facts. *See International Union of Elec. Workers v. NLRB*, 366 U.S. at 673-74, 81 S.Ct. at 1289-90. Interpreting the pleadings liberally, *see* Fed.R.Civ.P. 8(f), we believe they allege conduct which could fall within the prohibitions of § 8(b)(4). *See, e.g., NLRB v. Servette*, 377 U.S. 46, 52-54 (1964). We note that appellants themselves believed as much when they asked for removal over seven years (and many judicial proceedings) ago. All this is only to say that Bonanno stated a claim, not that it could prove a violation of the Act (indeed, it failed to do so). But, since Bonanno alleged facts sufficient to present a federal question, the district court had the *power* to hear the case.

[4] The Local arguments are, for the most part, relevant not to the issue of judicial "power," but to the question of district court "discretion." *See United Mineworkers v. Gibbs*, 383 U.S. at 726, 86 S.Ct. at 1139; *Ortiz v. United States*, 595 F.2d 65, 68-69 (1st Cir. 1979). Thus, the fact that Bonanno

did not pursue the Taft-Hartley claim vigorously in federal court — it conducted little discovery, and apparently presented no evidence at trial — weighs in favor of dismissal of the pendent state claim. The exercise of discretion to hear the state claim, however, is governed by the "considerations of judicial economy, convenience, and fairness to litigants." *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 627, 94 S.Ct. 1323, 1336, 39 L.Ed.2d 630 (1974); *United Mineworkers v. Gibbs*, 383 U.S. at 726, 86 S.Ct. at 1139. And, there are forceful considerations of this sort that cut the other way.

[5] For one thing, it was the *Local itself* that removed the action from state to federal court in the first place. As the Sixth Circuit remarked in a similar context,

> Not only did the union not contest the jurisdiction of the District Court, *the case was removed from the state court upon the union's motion*. Given the expenditure of judicial time and energy on this case, and given the common nucleus of operative fact, we cannot say that the exercise of pendent jurisdiction by the District Court was an abuse of its discretion.

Kayser-Roth Corp. v. Textile Workers Union of America, 479 F.2d 524, 526 (6th Cir.) (emphasis in original), *cert. denied*, 414 U.S. 976, 94 S.Ct. 292, 38 L.Ed.2d 219 (1973); *accord*, *Federal Prescription Service, Inc. v. Amalgamated Meat Cutters*, 527 F.2d 269, 274 (8th Cir. 1975). Similarly here, when the Union moved for a remand, the case had been pending in federal court for five years and had already been appealed to this court once. For another thing, there is no indication that the plaintiffs lacked good faith in making their initial Taft-Hartley allegations. Under these circumstances, we find no

abuse of the trial court's discretion in refusing to remand. *See Rosado v. Wyman*, 397 U.S. 397, 403-05, 90 S.Ct. 1207, 1213-14, 25 L.Ed.2d 442 (1970).

III

[6] We turn to a more difficult jurisdiction question raised by the individual defendants — the "pendent parties." Bonanno does not assert any *federal* claim against these parties. Bonanno's state claim against them was removed from the state court, along with the federal and state claims against the Local, on the theory that the state claim against the individuals was "pendent" to the federal claim against the Local. *See Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976). The individuals now claim that the federal court lacked jurisdiction to hear Bonanno's state claim against them. We agree.

The jurisdictional defect is not one of constitutional power. The grant of judicial power contained in Article III, Section 2, is related to the nature of the case, not the nature of each individual *claim* ("The judicial Power shall extend to all Cases, ...").

> [I]f, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

United Mine Workers v. Gibbs, 383 U.S. at 725, 86 S.Ct. at 1138 (emphasis in original). The claims against the individuals here are so closely related to both federal and state claims against the Local that we are willing to assume, constitutionally speaking, that "one judicial proceeding" would be appropriate.

Nonetheless, Article III also provides that the judicial power "shall be vested . . . in such inferior courts as the *Congress* may . . . establish." Thus, we must ask whether Congress has vested in the federal courts the power to hear Bonanno's claims against the individual defendants. *Aldinger v. Howard*, *supra*. We find it has not.

In *Aldinger* the Supreme Court developed a rule of statutory construction aimed at deciding whether Congress, in a jurisdictional statute, intended to open the federal courts to particular state law claims against particular "pending parties." The Court held that we should look at the pendent parties, and ask, "Did Congress intend this type of party to be the subject of this type of federal action?" If not, it is likely that Congress "expressly or by implication negated" jurisdiction to hear closely related state law claims against that "pendent party" as well. 427 U.S. at 18, 96 S.Ct. at 2422; *see Federal Deposit Ins. Corp. v. Otero*, 598 F.2d 627, 631 (1st Cir. 1979).

The *Aldinger* plaintiff brought a federal civil rights action under 42 U.S.C. § 1983 in federal court against county officials and the county. She asserted federal jurisdiction under 28 U.S.C. § 1343, a special statute giving federal district courts "original jurisdiction of any civil action authorized by law to be commenced . . . to redress" a § 1983 violation. She also brought related state claims against all of the defendants. At that time (prior to *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)), the courts believed that counties were not "persons" within the meaning of § 1983, and so the district court dismissed the federal claim against the county. It then dismissed the *state* law claim against the county as well, on the theory that the federal court lacked the power to make the county a "pendent party" for purposes of hearing the state claims against it. The Supreme Court affirmed, stating that

> [p]arties such as counties, whom Congress *excluded* from liability in § 1983, and therefore by reference in the grant of jurisdiction under § 1343(3), can argue with a great deal of force that the scope of that "civil action" over which the district courts have been given statutory jurisdiction should not be so broadly read as to bring them *back* within that power merely because the facts also give rise to an ordinary civil action against them under state law. In short, as against a plaintiff's claim of *additional* power over a "pendent party," the reach of the statute conferring jurisdiction should be construed in light of the scope of the cause of action as to which the federal judicial power *has* been extended by Congress.

427 U.S. at 17, 96 S.Ct. at 2421.

Aldinger would seem to require dismissal of the state claims against the individual pendent parties here, for the jurisdictional picture is very similar. The parties have relied upon § 303 of the Taft-Hartley Act, 29 U.S.C. § 187, which provides that

> (a) It shall be unlawful . . . for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 158(b)(4) of this title.
> (b) Whoever shall be injured in his business or property by reason [of] any violation of subsection (a) of this section may sue therefor in any district court of the United States . . ., or in any other court having jurisdiction of the parties . . . .

The district court noted that the language of the jurisdictional subsection (b), through its reference to subsection (a), applies

only to suits against labor organizations, not to suits against individuals. But, it concluded that "nothing in the statute suggests that Congress intended otherwise to limit a federal district court's power to decide closely related claims by the same plaintiff against parties who are not labor organizations."

The legislative history of § 303, however, reveals the contrary, namely a clear legislative intent to immunize individuals. *Cf. Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 101 S.Ct. 1836, 68 L.Ed.2d 248 (1981). When Senator Taft originally introduced the Taft-Hartley Amendments in the Senate, § 303 contained language that applied to individuals as well as unions. Other Senators strongly objected, pointing out that, as drafted, § 303 might resurrect the *Danbury Hatters* case, where individual union members were held liable for union activities. 93 Cong.Rec. 4839, *quoted in Complete Auto Transit*, 451 U.S. at 413, 101 S.Ct. at 1843. In response to these fears of "mass suits against employees," 93 Cong. Rec. 4839 (remarks of Senator Morse), *quoted in Complete Auto Transit*, 451 U.S. at 413, 101 S.Ct. at 1843, Senator Taft deleted the "individual liability" language and substituted the current language, so that "the action will be open only [to suits] against labor organizations," and not against individuals. 93 Cong.Rec. 4841 (remarks of Senator Taft), *quoted in Complete Auto Transit*, 451 U.S. at 414, 101 S.Ct. at 1843-44. In finally enacting the law, Congress adopted the new Senate language, expressly declining to accept House language that would have made the individuals also liable. *Complete Auto Transit*, 451 U.S. at 414-15, 101 S.Ct. at 1843-44.

There is thus more, not less, reason here than in *Aldinger* to find that Congress "by implication" has "negated" pendent party jurisdiction over this related state law claim. In *Aldinger* the language of the jurisdictional statute (§ 1343(3))

was broader than § 303(b); the "excluded" pendent claim was less clearly outside the language of the jurisdictional statute, *cf. Monell* v. *Dept. of Social Services, supra,* (holding that local governments are "persons" subject to § 1983 liability); and the legislative history less clearly showed an intent to exclude. In sum, given *Aldinger*, § 303(b) cannot be interpreted to allow federal court jurisdiction over claims against individuals who are parties only to a related state claim.

We are aware of no other basis for jurisdiction. The Local has not itself sued the individuals for reimbursement, so they are not third party defendants, and no issue of ancillary jurisdiction arises. (And, in light of *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978), Bonanno probably could not sue the individuals directly even if they were third party defendants). Bonanno has alleged neither diversity jurisdiction, 28 U.S.C. § 1332, nor "arising under" jurisdiction, 28 U.S.C. § 1331. In any event, we assume that the Supreme Court intends us to read § 1331 in light of the pendent party limitations inferable from § 303(b), for otherwise *Aldinger* would seem meaningless.

Aldinger is not quite sufficient to dispose of the matter, however, for unlike *Aldinger*, this case involves *removal*. Thus, we must ask whether the removal statute, 28 U.S.C. § 1441, provides a basis for jurisdiction which otherwise would be lacking. The relevant portions of that statute read as follows:

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . .

> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

Subsection (b) allows removal only of a case which plaintiff might have brought in federal court directly; thus, it provides no additional basis for jurisdiction. Subsection (c), however, allows a federal court to take jurisdiction of "separate and independent" causes of action that it might not otherwise have statutory authority to hear. *See, e.g., American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951); *Charles Dowd Box Co. v. Fireman's Fund Ins. Co.*, 303 F.2d 57 (1st Cir. 1962); *H.A. Lott, Inc. v. Hoisting & Portable Engineers Local No. 450*, 222 F. Supp. 993 (S.D. Tex. 1963). The question is whether that subsection helps Bonanno, and the answer is that it does not. Under the test of *American Fire & Casualty v. Finn, supra*, the state claim against the individuals is not "separate and independent" from the other claims in the case; it is too closely related to those claims to satisfy *Finn's* requirements.

To understand this conclusion, we must begin with the commentators' suggestions that § 1441(c) as a matter of logic *ought* to help Bonanno in a case like this one. Both Moore's treatise, and that of Wright, Miller & Cooper, suggest that when a defendant removes an "arising under" case, any state claims involved are either sufficiently closely related to the federal claims to be considered "pendent" (and thus removable under § 1441(b)), or they are sufficiently unrelated to be considered "separate and independent" (and thus removable

under § 1441(c)). 1A J. Moore, *Federal Practice* ¶ 0.163[4.5] at 721 (2d ed. 1982); Wright, Miller & Cooper, *Federal Practice and Procedure* § 3724 at 649 (1976). In either event, the federal court has the *statutory power* to hear them, though, of course, in its discretion it can remand them to state court. What sense does it make, after all, to have a *tertium quid* of certain state claims — those too distant to be pendent, too close to be "separate and independent" — that alone, in an "arising under" case, the federal court would have no statutory power to hear? However, the history of § 1441(c), taken together with *Aldinger*, suggests that this middle category of cases does exist, and that this case falls within that category.

At first reading, § 1441(c) seems bizarre, at least as applied to "arising under" cases. It says that the more *un*related a state claim is to a federal claim, the more likely it is that removal is appropriate. But, this anomaly arises from history and, in paticular, from the fact that § 1441(c) was written with *diversity* cases in mind. Before 1875, a plaintiff seeking to sue both an out-of-state defendant and an in-state defendant in federal court could not do so; there was no federal diversity jurisdiction because of lack of *complete* diversity. *See Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806). If he sued them in state court, however, federal jurisdictional law then allowed the out-of-state defendant to remove his portion of the case to federal court, provided that the claim against him was "separable" from the claim against the in-state defendant. *See* the Separable Controversy Act of 1866, 14 Stat. 306 (1866). The theory was that the defendant should not lose the protection of diversity jurisdiction merely because the plaintiff chose to join him with an in-state defendant. *Barney v. Latham*, 103 U.S. 205, 210, 26 L.Ed. 514 (1881).

In 1875, Congress passed a statute which became the former 28 U.S.C. § 71. It read

> And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district.

This statute applied only in *diversity* cases. As interpreted by the courts this statute allowed a defendant to remove a case — indeed the *entire* case with its several defendants — where there was a "separable controversy." *Barney* v. *Latham*, *supra*. In other words, where there was a "separable controversy," the out-of-state defendant could remove, and the in-state defendant could tag along. The courts also made other complicated distinctions, interpreting the statute liberally to allow removal in a wide variety of cases. *See*, *e.g.*, Cohen, *Problems in the Removal of a "Separate and Independent Claim or Cause of Action,"* 46 Minn.L.Rev. 1 (1961).

As part of the 1948 Revision of the Judicial Code, Congress replaced this statute with § 1441(c). The Revisers tried to simplify the test for removal. *See* Revisions of Titles 18 and 28 of the United States Code: Hearings on H.R. 2055 Before Subcommittee No. 1 of the House Judiciary Committee, 80th Cong., 1st Sess. 29 (1947) (statement of J. Moore). And, they intended to *limit* the range of cases that diversity defendants could remove. They did this in part, by replacing the "separable controversy" test with the words "separate and independent claim or cause of action." Insofar as diversity cases were concerned, this formula *did* make fewer cases re-

movable. *See* 1A J. Moore, *supra*, ¶ 0.163[4.-1]; Cohen, *supra*, at 18-19. Because of the "complete diversity" requirement, if an out-of-state defendant (linked to an in-state defendant) could not satisfy the "separate and independent" test, the case could not be removed. *American Fire & Casualty Co. v. Finn*, *supra*.

The 1948 Revisers, however, also omitted the diversity language of § 1441(c)'s predecessors; the section thereby applied to "arising under" cases as well. And, as applied to those cases, the new stricter test did *not* stop cases from being removed. Since there is no equivalent in an "arising under" case to the "complete diversity" requirement, "arising under" actions can be removed from state court whether or not other state claims or defendants are attached. Thus, the only effect of § 1441(c) is sometimes to *expand* the scope of removal by allowing the "separate and independent" state claim defendant to tag along. There is no indication that the revisers foresaw this result, *see* Cohen, *supra*, at 31-32, and commentators have questioned its constitutionality, *e.g.*, Lewin, *The Federal Courts' Hospitable Back Door*, 66 Harv.L.Rev. 423 (1953); Cohen *supra*, at 26; Ireland, *Entire Case Removal Under 1441(c)*, 11 Indiana L.Rev. 555, 571 (1978).

By understanding § 1441(c)'s history — its focus on the diversity case and its goal of restricting removal — one can understand the Supreme Court's decision in *American Fire & Casualty Co. v. Finn*, *supra*. *Finn* was a diversity case, and the Supreme Court there interpreted the words "separate and independent claim or cause of action" strictly, as the statute's framers intended, to limit removal. 341 U.S. at 12, 71 S.Ct. at 539. Thus, the Court held that

> where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c).

341 U.S. at 14, 71 S.Ct. at 540. *See New England Concrete Pipe Corp. v. D/C Systems of New England, Inc.*, 658 F.2d 867 (1st Cir. 1981).

In the present case, the state claim against the individuals was based upon "an interlocked series of transactions," some of which were used to infer the federal claim. Plaintiffs' complaint alleged injuries arising out of a single, protracted strike, in which mass picketing and violence affected both Bonanno and third persons. Judging from the complaint, some of the individual instances of picketing and violence affected third parties within the scope of the Taft-Hartley Act. The "Taft-Hartley" instances comprise a portion of the "state law" instances; and all instances are connected and intertwined. The "claim or cause of action" against the individuals thus fails to meet the "separate and independent" test of *Finn*, *see* 341 U.S. at 16, 71 S.Ct. at 541, for both claims "substantially derive from the same facts." *New England Concrete Pipe Corp. v. D/C Systems of New England*, 658 F.2d at 874 n.12. *Cf. McMahon Chevrolet, Inc. v. Davis*, 392 F.Supp. 322, 324 (S.D.Tex. 1975).

In sum, *Aldinger* closes the door to these "pendent party" claims, and § 1441(c) fails to reopen it. We have what the commentators consider an anomalous "middle" category of parties left behind in state court. But we see no serious harm arising out of this interpretation of the law. To interpret the words "separate and independent" more liberally here would depart from *Finn*, suggest a different interpretation of these same words in "arising under" cases, and thereby proliferate standards in an area already too complex. Any anomaly arising out of the much-criticized § 1441(c) can be resolved through legislation. The American Law Institute has suggested statutory revisions, including one which would require the district court to remand all claims not within its pendent jurisdiction, effectively eliminating the use of § 1441(c) in

federal question cases of this sort. *See ALI Study of the Division of Jurisdiction Between State and Federal Courts*, 29, 212-13 (1969).

Since this court lacks jurisdiction over the claims against the individual defendants, the district court's decision on this point must be reversed. The proper statutory basis for removal of the claims against the Local is § 1441(b), which, given *Aldinger*, does not allow the pendent parties here to tag along.

[7] We note one final, related jurisdictional matter in respect to § 1441(b). That section allows removal of "*any civil action*" of which the district courts have original jurisdiction. The previous version of the statute referred to "*any suit* of a civil nature," *Alabama Great So. Ry. Co. v. American Cotton Co.*, 229 F. 11, 15 (5th Cir. 1916), and each cause of action was considered a separate suit. *Tillman v. Russo-Asiatic Bank*, 51 F.2d 1023 (2d Cir. 1931), *cert. denied*, 285 U.S. 539, 52 S.Ct. 312, 76 L.Ed. 932 (1932). One commentator has argued that the term "civil action" means the *whole* state proceeding, so that if *some* claims or parties are not removable, *none* are. Lewin, *supra*, at 426. However, this is inconsistent with the well-established rule that the removal statute embraces the same "class of cases" as does the original jurisdiction statute. *Tennessee v. Union & Planters Bank*, 152 U.S. 454, 14 S.Ct. 654, 38 L.Ed. 511 (1894); *see Brough v. United Steelworkers of America*, 437 F.2d 748 (1st Cir. 1971). Moreover, before 1948, the "arising under" defendant was allowed to remove his "suit," leaving other defendants behind, if necessary. *See, e.g., The Pacific Railroad Removal Cases*, 115 U.S. 1, 22-23, 5 S.Ct. 1113, 1123-24, 29 L.Ed. 319 (1885); *Galveston, Harrisburg & San Antonio Ry. Co. v. Hall*, 70 F.2d 608 (5th Cir. 1934). The Reviser nowhere suggested an intent to change this result. Rather, the Reviser's Note indicates that the change in terminology was meant to be cosmetic; Moore

concludes that no change in substance was intended. 1A J. Moore, *supra*, at ¶ 157[4.-1]. We conclude that it is proper here for the Local to remove Bonanno's "arising under" and pendent claims against it to federal court, even if the other state claim defendants must be left behind.

The claims against the individual defendants must be remanded to the state court from which they came. *American Fire & Casualty Co. v. Finn*, 341 U.S. at 18-19, 71 S.Ct. at 542-43.

IV

We can deal with the Local's remaining contentions more briefly.

1. The Local attacks the district court's decision as contrary to Norris-LaGuardia Act § 6, which forbids holding it responsible for the tortious acts of its "officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." 29 U.S.C. § 106. *See United Mine Workers v. Gibbs*, 383 U.S. at 737, 86 S.Ct. at 1144; *United Bhd. of Carpenters v. United States*, 330 U.S. 395, 403, 67 S.Ct. 775, 779, 91 L.Ed. 973 (1947). Here, however, the district court could find that the "clear proof" standard was satisfied.

[8] There is sufficient evidence that the union's representative, Salter, participated in the threats and acts of violence. When the plaintiffs first requested an injunction Salter promised the court he would control the pickets, and no injunction was issued. He then failed to deliver on this promise, and the court entered a restraining order. The district court reasonably found that Salter's failure was "deliberate." He had the power and authority to control the violence, but he never removed any picket from the line, nor did he ask the

Local to impose any fines. (Other evidence indicates that the Local's president knew of the allegations of violence as well.)

The Local argues that Section 6 of the Norris-LaGuardia Act requires a showing that *top* union officials approved the violence. But both the Supreme Court and other lower courts have based liability on the actions of officials comparable in rank to Salter. *United Mine Workers v. Gibbs*, 383 U.S. at 738, 86 S.C.t. at 1145 ("the U.M.W. representative"); *Kayser-Roth Corp. v. Textile Workers of America*, 479 F.2d 524, 527 (6th Cir.) (the "strike supervisors"), *cert. denied*, 414 U.S. 976, 94 S.Ct. 292, 38 L.Ed.2d 219 (1973); *see Ritchie v. United Mine Workers*, 410 F.2d 827 (6th Cir. 1969) (examining circumstantial evidence of involvement by union members). The Local adds that there is no evidence that it approved of *illegal* action. But, the Supreme Court has held that the union need do no more than authorize an agent's general activity. For example, "[t]he grant of authority to an officer of a union to negotiate agreements with employers . . . may well be sufficient to make the union liable." *United Bhd. of Carpenters v. United States*, 330 U.S. at 410, 67 S.Ct. at 783.

In sum, on the facts present here the district court could reasonably find "knowing tolerance" by the union, *Gibbs*, 383 U.S. at 739, 86 S.Ct. at 1145-46, if not actual authorization, *see Gibbs*, 383 U.S. at 738, 86 S.Ct. at 1145; *Kayser-Roth*, 479 F.2d at 526-27, and it could, therefore, hold the Local liable for the acts of its members.

[9] 2. The Local argues that Bonanno should not have been allowed to recover the costs of protective services for 1976. It claims, first, that Bonanno's fear of violence in 1976 was unreasonable. The record, however, shows many instances of violence before 1976, and at least eight instances during that year; it provides adequate support for the award.

The Local adds that any danger was Bonanno's fault, for Bonanno refused to ratify the bargaining agreement that all

other linen companies accepted in April, 1976. Whether or not Boannno was within its legal rights in refusing to ratify, however, striker violence is not justified. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627 (1939).

[10,11] Finally, the Union claims that Bonanno cannot recover for the expense of putting armed guards on its delivery trucks, for Massachusetts law prohibits "licensees" from "furnish[ing] armed guards upon the highways for persons involved in labor disputes." Mass.Gen.Laws ch. 147, § 30(8). In Massachusetts, however, a "violation of law is a bar to recovery . . . only in instances where it is a contributing cause to the injury." *Janusis v. Long*, 284 Mass 403, 410, 188 N.E. 223 (1933); *see Wallace v. Patey*, 335 Mass. 220, 222, 139 N.E.2d 407 (1957). Assuming a "violation of law" for the sake of argument, we will see no relation between the "illegality" and the expense. Bonanno had to pay for the guards, not their weapons.

3. The Union claims that the district court erred in awarding prejudgment interest (under Mass.Gen.Laws ch. 231, § 6B) for damages which accrued after the action was filed, citing *Jet Spray Cooler, Inc. v. Crampton*, 377 Mass. 159, 182 n.21, 385 N.E.2d 1349, 1362 n.21 (1979).

[12,13] Subsequent Supreme Judicial Court cases, however, have made clear that the court is to "add interest on the entire amount of the verdict." *Griffin v. General Motors Corp.*, 380 Mass. 362, 403 N.E.2d 402, 406 (1980); *Carey v. General Motors Corp.*, 377 Mass. 736, 387 N.E.2d 583, 588-89 (1979). Section 6B establishes a simple, mechanical rule: rather than calculating the appropriate sum of interest for each part of an award, where the damages may have accrued on any number of different dates, the clerk of court simply adds to the court's total award "interest thereon . . . from the date of the commencement of the action . . . ." We think the district court correctly applied this rule.

The judgment of the district court against the defendant Teamsters Union is affirmed; the district court's denial of the motion of defendants Forrest, Halloran, and Salter is reversed; and the court is instructed to vacate the judgment against them and to remand the case to the Superior Court of Suffolk County, Massachusetts.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1755

CHARLES D. BONANNO LINEN SERVICE, INC., ET AL.,
Plaintiffs, Appellees,

v.

WILLIAM J. McCARTHY, ET AL.,
Defendants, Appellants.

Campbell, *Chief Judge*, Coffin, Bownes and Breyer, *Circuit Judges*, and Wyzanski,* *District Judge*

MEMORANDUM AND ORDER

Entered: June 1, 1983

The discussion in our opinion to which petitioner refers in his Petition for Rehearing and Rehearing En Banc was confined to the question of what need be stated in a state court complaint in order to obtain removal to federal court. In light of the Petition for Rehearing and Rehearing En Banc, we fear a possible ambiguity in interpretation and we therefore modify the opinion as follows:

Page 5. Strike lines 5 through 14. Replace those lines with the following:

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* Of the District of Massachusetts, sitting by designation.

affecting [interstate] commerce" is sufficient. We are willing, for removal purposes, to presume this to be an adequate allegation of the rest. *See Herbert Burman, Inc.* v. *Local 3, Int'l Bhd. of Elec. Workers*, 214 F. Supp. 353 (S.D.N.Y. 1963). *Cf. Tucci* v. *International Union of Operating Engineers*, 316 F. Supp. 1127 (W.D. Pa. 1970). *See also Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964). And, in our view,

Page 10, line 7. Strike the word "primary".

Page 10. Strike lines 12 through 14 and replace them with the following:

to coerce third persons, it can fall within the prohibitions of § 8(b)(4), depending on the precise nature of the picketing and the intent of the pickets. *See, e.g., NLRB* v. *Enterprise Ass'n of Pipefitters, Local 638*, 429 U.S. 507, 510 (1977); *NLRB* v. *Denver Building Council*, 341 U.S. 657, 689 (1951). *United Scenic Artists, Local*

Page 10, last line. After the words: "U.S. at 673-74." insert the following:

Interpreting the pleadings liberally, *see* Fed. R. Civ. P. 8(f), we believe they allege conduct which could fall within the prohibitions of § 8(b)(4). *See, e.g., NLRB* v. *Servette*, 377 U.S. 46, 52-54 (1964). We note that appellants themselves believed as much when they asked for removal over seven years (and many judicial proceedings) ago.

The Petition for Rehearing and Rehearing En Banc are denied.

By the Court:
Francis P. Sigliano
Clerk.

Appendix C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHARLES D. BONANNO LINEN SERVICE, INC., *et al.*, Plaintiffs	
v.	CIVIL ACTION NO. 75-3313-K
WILLIAM J. McCARTHY, *et al.*, Defendants	

September 30, 1980
Memorandum and Order

I.

This action, which arose out of a labor dispute beginning in 1975 between plaintiff Bonanno Linen Services ("Bonanno") and defendant Teamsters Union Local No. 25 ("Local 25"), is before the court on defendants' "Motion to Terminate Injunction and to Remand Action for Want of Jurisdiction."

The case was originally filed in Suffolk Superior Court, on August 7, 1975.[1] The case was removed to this court on defendants' petition of August 9, 1975. Judge Tauro held hearings on plaintiffs' request for injunctive relief, and on September 8, 1975 issued a Temporary Restraining Order,

[1] As originally filed, the action named several other members of the New England Linen Supply Association, all of whom subsequently withdrew from the case.

based on stated findings of jurisdiction and unlawful conduct by defendants, enjoining defendants from interfering with, harming or threatening plaintiffs' business, employees, property, and third parties dealing with plaintiffs. Judge Tauro's order was affirmed as a temporary injunction by the Court of Appeals for the First Circuit, 532 F.2d 191 (1st Cir. 1976). In affirming, the Court of Appeals found "that the oral evidence at the hearing was sufficient by itself to support a temporary injunction," and that a "review of the hearing transcript demonstrates ample support for [Judge Tauro's] findings" of threats and violence. *Id.* at 190. The only issues remaining in the case are defendants' liability for property damage and the cost of protective services arising out of alleged strike-related violence, and whether the injunction should be dissolved, modified, or kept intact.[2]

II.

Defendants' Motion to Terminate the Injunction

Defendants urge that the court terminate the injunction, which is still in effect, on the grounds that it has been in effect for five years, that it is insufficiently specific as to its duration, and generally that the circumstances upon which it was premised have ceased. Plaintiff states that the strike against Bonanno has not terminated. Pltf. mem. at 5.

The court finds no basis for terminating or modifying the injunction at this time. The existence of circumstances justifying the continuation, modification, or termination of the injunction is an issue upon which evidence would have to be re-

[2]The Court of Appeals recently decided a related matter, *NLRB* v. *Charles D. Bonanno Linen Service, Inc.*, No. 79-1824 (slip op., Sept. 12, 1980). However, that case, which involved the question whether Bonanno's unilateral withdrawal from the multiemployer bargaining unit in the face of an impasse constituted an unfair labor practice, has no bearing on the issues in the instant case.

ceived, and therefore it would be inappropriate to act on such a motion at this time.

III.

Defendants' Motion to Remand for Want of Jurisdiction

In their Petition For Removal, ¶¶ 5, 6, defendants referred to the allegations in paragraphs 20(f) and 20(h) of the complaint (threats of violence against third parties dealing with plaintiff) as "appear[ing] to represent an attempt . . . to state a cause of action within the meaning of 29 U.S.C. 187 of which this court has original jurisdiction." Defendants' memorandum in support of this petition states that "[d]efendants contend that the Plaintiffs' Complaint . . . states a claim for relief over which the federal district courts have original jurisdiction pursuant to 29 U.S.C. § 187 . . . [which] proscribes the commission of unlawful secondary activity as more fully defined in 29 U.S.C. § 158(b)(4) . . . ." In granting the Temporary Restraining Order, Judge Tauro found "that the Court may exercise jurisdiction over this case under 28 U.S.C. 1441, 29 U.S.C. 187, and under the principles of pendent jurisdiction . . . ." *Id.* ¶ 1. The Court of Appeals affirmed the injunction, thereby necessarily implying an affirmance of the determination of federal jurisdiction.

Defendants now argue that there is no basis for federal jurisdiction over plaintiff's claims, and that the case should therefore be remanded to state court pursuant to 28 U.S.C. § 1447(c). In essence, defendants contend that plaintiffs failed to allege a "substantial" federal claim, or that it has become apparent that no genuine federal issue is involved,[3] and that there is therefore no basis for this court to retain and

[3] Defendants stated that ". . . the ambiguity of paragraphs 22 and 23 of the state court complaint might have arguably rendered jurisdiction under 29

and decide plaintiffs' state law damage claims under the doctrine of pendent jurisdiction.

29 U.S.C. § 187 confers jurisdiction upon the federal district courts over actions to redress injuries resulting from conduct defined in 29 U.S.C. § 158(b)(4) as unfair labor practices. Among the proscribed union activities described in § 158(b)(4) is

> (ii) to *threaten*, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is — . . . (B) forcing or requiring any person to cease . . . dealing in the products of any other producer, processor, or manufacturer, or *to cease doing business* with any other person . . . . (emphasis added).

The conduct just described is commonly referred to as unlawful "secondary activity" or "secondary boycott" of an employer's customers or suppliers, to be contrasted with lawful primary strikes and primary picketing of the immediate employer.

The court concludes that the plaintiffs have amply alleged unlawful secondary activity by defendants within the meaning of 29 U.S.C. § 158(b)(4). The Verified Complaint alleges that "The valve of an oil truck [apparently owned by a third party] was cracked open while parked at the Roxbury place of business of the Plaintiff," ¶ 20(f); "*Various third parties doing bus-*

U.S.C. § 187; however, *subsequent discovery* made it patently clear that this case involves only a common law tort case for damages under state law." Deft. Supp. Mem., p. 2 (emphasis added). Plaintiff has apparently dropped its claim for damages for interference with its business by defendants, and now seek damages only for property damage and the cost of protective services.

iness with Plaintiffs have been threatened with physical violence by pickets identified as linen supply drivers involved in the labor dispute and members of Local 25," ¶ 20(h) (emphasis added); "As a result of the foregoing . . . certain suppliers of the Plaintiffs have refused to deliver supplies." ¶ 22. Indeed, it was these allegations to which defendants pointed in 1975 as the jurisdictional basis for removing the case to federal court. It is anomalous that nearly five years later defendants urge, in effect, that contrary to their earlier representations, "the case was removed improvidently and without jurisdiction." 28 U.S.C. § 1447(c).

Where (1) the state and federal claims in a lawsuit "derive from a common nucleus of operative fact," (2) "plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding," and (3) the federal claim is "substantial," a federal district court may in its discretion exercise pendent jurisdiction over the state law claims. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). This doctrine is based on "considerations of judicial economy, convenience and fairness to litigants." *Id.* at 726. The first two of the above prerequisites for pendent jurisdiction are clearly present in this case, since all of plaintiff's claims arose out of the same incidents of strike-related violence. The dispute here hinges on the "substantiality" criterion.

Notwithstanding dicta to the contrary in *Gibbs*,[4] subsequent decisions have made clear that where the federal claim is "substantial," district courts have the discretion to retain jurisdiction over the remaining state law claims even after the dismissal, abandonment or settlement of the federal claim. See *Rosado* v. *Wyman*, 90 S.Ct. 1207, 397 U.S. 397, 403-05 (1970); *State of Arizona* v. *Cook Paint and Varnish Corp.*,

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[4] "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. at 726.

541 F.2d 226, 227 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977); *Kuhn* v. *National Ass'n of Letter Carriers*, 528 F.2d 767, 771 n.6 (8th Cir. 1976); 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3522, at 53-54 (1975) [herinafter cited as Wright, Miller & Cooper]. The substantiality criterion precludes federal jurisdiction only where the federal claim upon which jurisdiction is based is "obviously without merit" or wholly frivolous. *Cf. Hagans* v. *Lavine*, 415 U.S. 528, 536-37 (1974). See 13 Wright, Miller & Cooper § 3564. Here, plaintiff's allegation of secondary activity by defendants is plainly substantial; there is no indication that it was frivolous or made in anything other than good faith at the time the Verified Complaint was filed. Certainly the allegation was not a device inserted by plaintiffs to create federal jurisdiction, the complaint having been filed in state court. Even if discovery later showed this allegation to be unsupported, that does not prove that the allegation was jurisdictionally insubstantial. Of course, the sufficiency of the pleadings to confer jurisdiction may be raised at any time, since a court is always obliged to notice its want of subject matter jurisdiction. However, a demonstration of lack of merit of allegations, upon full development of the evidence, does not retroactively deprive the court of jurisdiction. See *Kayser-Roth Corp.* v. *Textile Workers*, 479 F.2d 524 (6th Cir.), *cert. denied*, 414 U.S. 976 (1973) (trial court's finding against employer on secondary boycott claim did not vitiate pendent jurisdiction).

The court finds that in the interests of judicial economy, convenience, and fairness to plaintiffs, this court should retain jurisdiction and decide plaintiff's damage claims. This case has been pending in this court for five years, has been before three judges and the Court of Appeals, and has received substantial attention from courts and counsel. The fact that this case is here because defendants removed it from the state

court, together with defendants' belated attention to the alleged jurisdictional defect, militate against remanding the case to the state Superior Court.

ORDER

For the above reasons, it is ORDERED:

Defendants' "Motion to Terminate Injunction and to Remand Action for Want of Jurisdiction" is denied.

Robert E. Keeton
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHARLES D. BONANNO LINEN SERVICE, INC., *et al.*, Plaintiffs	)	
v.	)	CIVIL ACTION NO. 75-3313-K
WILLIAM J. McCARTHY, *et al.*, Defendants	)	

MOTION TO DISMISS OF THE INDIVIDUAL DEFENDANTS — WILLIAM J. McCARTHY, HERBERT T. SALTER, GERALD J. HALLORAN, PETER FOREST, ARTHUR MORAN, JACK KERWIN, JOHN O'MALLEY, ERNEST ZIMMERMAN AND JOSEPH CAICO

Now come the individual Defendants and move to dismiss the instant case on the grounds that this Court lacks subject matter jurisdiction to hear the pendent state law claims, since the individuals were not proper Defendants in the Section 303(b), 29 U.S.C. § 187(b), action.

For the Defendants,
WILLIAM J. McCARTHY, ET AL.,
By their Attorneys,
James T. Grady
Gabriel O. Dumont, Jr.
GRADY AND DUMONT
75 Federal Street
Boston, MA 02110
Dated: _____ Tel. (617) 426-9450

CERTIFICATE OF SERVICE

I, James T. Grady, counsel for the Defendants, hereby certify that I have this day delivered in hand a copy of the foregoing Motion To Dismiss to Howard I. Wilgoren, Esquire, LEPIE and COVEN, 13 Tremont Street, Boston, Massachusetts 02108.

Dated: Sept. 23, 1981 James T. Grady

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHARLES D. BONANNO LINEN SERVICE, INC., VS. WILLIAM J. McCARTHY, *et al.*,	CIVIL ACTION NO. 75-3313-K

MOTION TO ADMIT EVIDENCE

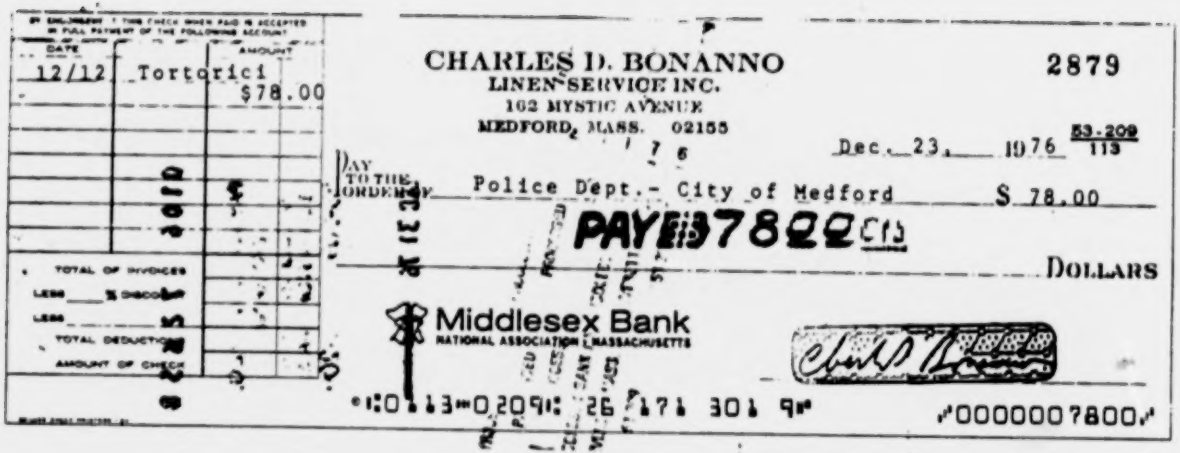
Now comes Charles D. Bonanno Linen Service, Inc., plaintiff in the above-captioned matter and respectfully moves that a check dated December 23, 1976 payable to Police Dept.-City of Medford in the amount of Seventy-eight ($78.00) dollars, which is attached hereto, be admitted into evidence.

In support of the instant motion, it is submitted that said check was inadvertently excluded from other similar checks when they were submitted into evidence as plaintiff's Exhibit No. 10.

James T. Grady, Esquire, Counsel for the defendant has stated to the undersigned that he has no objection to the granting of this motion.

Respectfully submitted,

Howard I. Wilgoren
Leipe and Coven
18 Tremont Street
Suite 618
Boston, Massachusetts 02108



DATE		AMOUNT
12/12	Tortorici	$78.00

CHARLES D. BONANNO
LINEN SERVICE INC.
102 MYSTIC AVENUE
MEDFORD, MASS. 02155

2879

Dec. 23, 1976 53-209/113

PAY TO THE ORDER OF Police Dept. - City of Medford $ 78.00

PAY 78 00

DOLLARS

Middlesex Bank
NATIONAL ASSOCIATION MASSACHUSETTS

⑆011300209⑆ 26 171 301 9⑈ ⑈0000007800⑈

TOTAL OF INVOICES
LESS ___ % DISCOUNT
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHARLES D. BONANNO LINEN SERVICE, INC., *et al.*, Plaintiffs v. WILLIAM J. McCARTHY, *et al.*, Defendants	CIVIL ACTION NO. 75-3313-K

June 30, 1982
Opinion

This is an action for compensatory damages filed by plaintiff Charles D. Bonanno Linen Services, Inc. ("Bonanno") against defendant Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 25 ("Local 25"), an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and individual defendants who are members of Local 25.[1] The action was tried before the court without a jury on September 24, 25, and 28, 1981 and October 14, 21, and 30, 1981. All findings of fact stated in parts I and II *infra* are from a preponderance of the evidence. Findings of fact in parts III and IV *infra* are based

[1] The individual named defendants are William McCarthy, Herbert Salter, Gerald Halloran, Peter Forrest, Arthur Moran, Jack Kerwin, John O'Malley, Ernest Zimmerman, and Joseph Caico. Defendants McCarthy and Salter are also named in their capacities as officers of Local 25.

on clear proof. Evaluative findings and conclusions of law are stated in the remaining portions of this opinion.

I.

This action arises from a labor dispute between Bonanno and Local 25 that began in the spring of 1975. Bonanno is a Massachusetts corporation with its principal place of business in Medford, Massachusetts where it conducts a retail and commercial dry-cleaning and laundry service operation. A portion of that business involves the renting and distributing of linens, uniforms, and related products. As part of this distribution operation, Bonanno employed twelve truck drivers in the spring of 1975. At that time the drivers were working under a collective bargaining agreement negotiated between their representative union, Local 25, and the New England Linen Supply Association ("Association"), a multi-employer bargaining group whose membership included Bonanno. During March and April of 1975, Local 25 and the Association were unable to reach an agreement on a new contract, and in June of 1975 Local 25 terminated the then-existing collective bargaining agreement. The membership of Local 25 voted in favor of a selective strike on June 18, 1975, and shortly thereafter union leaders selected Bonanno as the target company. On June 23, 1975 the union announced its decision and the Bonanno drivers commenced picketing. The following day most members of the Association imposed a lock-out on Local 25 employees. This lock-out ended on November 21, 1975, when Bonanno withdrew from the Association.[2] The strike and the picketing at Bonanno, however, continued until August, 1977.

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[2] In a separate action brought by the National Labor Relations Board against Bonanno, it was determined that Bonanno's unilateral withdrawal from the Association and Bonanno's refusal to implement the collective bar-

Between June 23, 1975 and September 8, 1975, Local 25 maintained picket lines at Bonanno during most hours of the day and night. The pickets, sometimes numbering as many as forty persons, frequently massed in the morning and the mid-afternoon hours, at which times the Bonanno trucks, which were being driven by route supervisors and replacement employees, would be leaving or returning to the plant. The pickets blocked the paths of trucks, verbally abused substitute drivers, harrassed production employees, and obstructed the entrance to the retail store located at the front of the plant. The mass picketing continued until September 8, 1975, at which time this court issued a temporary injunction restricting the number of pickets.[3] Although the picketing continued each day and on many evenings after September 8, 1975, there were rarely more than fifteen pickets present at the plant at any one time. The number of pickets decreased further after November 21, 1975, when the lock-out ended and members of Local 25 (other than Bonanno drivers) returned to work.

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gaining agreement executed in April, 1976 between Local 25 and the Association constituted an unfair labor practice. *See Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, ___ U.S. ___, 50 U.S.L.W. 4087 (January 12, 1982).

[3]This action, as originally filed, included other Association companies as plaintiffs. On September 8, 1975 Judge Tauro, to whom the case was then assigned, issued a temporary restraining order limiting the number of pickets permitted at the location of any one Association member to the number of drivers who were striking or were locked out at that location. This order, which by stipulation of the parties was treated as a temporary injunction, was affirmed by the First Circuit on March 15, 1976. *See Charles D. Bonanno Linen Service, Inc.* v. *McCarthy*, 532 F.2d 189 (1st Cir. 1976).

Throughout most of the strike, the picketing at Bonanno was accompanied by acts of violence. Employees were threatened with physical injury, trucks were sprayed with paint, windshields were broken, burning cigaretts were tossed into trucks containing inflammable linens, incendiary flares were thrown into the yard, nails were strewn at the exit gate of the yard, windows in the plant were smashed, the gate to the plant was rammed with an automobile, a wire to the fire alarm system on the roof of the plant was cut, a bullet was fired into the plant, and a truck was damaged on the street leading from the plant when a picket driving an automobile intentionally caused a collision.

The violence also occurred along delivery routes and at the homes of substitute drivers. In July, 1975 Richard Smith, a route supervisor who was substituting as a driver during the strike, was brutally attacked and clubbed by two men with blackjacks. During the attack, which occurred along a delivery route in Boston, Smith was told that he would be killed unless he stopped driving for Bonanno. Subsequently, other substitute drivers were warned that they too would suffer a similar fate unless they stopped driving for Bonanno. On one occasion pickets followed John Doherty onto a highway and attempted to run his truck off the road. In another incident pickets followed Charles Chivakos, induced him to step out of his truck, and then drove their vehicle at him. Trucks were regularly followed by pickets along delivery routes, a practice that began during the summer of 1975 and intensified during the fall and winter. On more than one occasion when trucks were left unattended after being followed by pickets, tires were slashed, windows were broken, or invoices were stolen.

Acts of violence were also directed at persons other than substitute drivers. For example, security guards who were hired to patrol the plant or to accompany drivers on delivery routes were threatened by pickets. In September, 1975 one

guard was physically attacked in front of the plant by Gerald Halloran, the Local 25 shop steward at Bonanno. Other persons who were threatened by pickets include Charles Bonanno, the owner of the company, David Holsberg, the plant manager, and John McBride, an engineer at the plant.

Most of the acts of violence by pickets occurred during 1975. After January of 1976 the violence was sporadic. There were approximately eight incidents of violence during all of 1976, the most serious of which occurred in the spring when a group of pickets threw rocks at Bonanno trucks and plant windows. Picketing at the site continued on a regular basis throughout most of 1976 in small numbers, and as late as November, members of Local 25 sometimes picketed at night. Although the picketing continued until August, 1977, the only incident of violence during the last year of the strike occurred in June when an incendiary flare was thrown into the yard of the plant.

During the course of the strike, Bonanno attempted to maintain order on the picket lines and to protect its employees and property in various ways. On the first day of the strike, Bonanno made arrangements with Guard Dogs, Inc., a private security service, to bolster plant protection. Since the Medford police department was unable to assign officers to the picket lines until the evening of June 27, 1975, Guard Dogs, Inc. provided all protective services for Bonanno during the first days of the strike. Each day, John McLaren of Guard Dogs, Inc., the supervisor of the security guards, would consult with managers from Bonanno and assign guards to the plant based on the size of the picket line and reports of violence. During the daytime hours of the first week of the strike, the primary duty of the guards was to maintain order along the picket lines. The security guards would open the picket lines to allow trucks, employees, and customers to pass through the gate or the entrance to the store. In addition,

security guards would drive to delivery sites to check on the safety of substitute drivers and would respond to specific requests for assistance by drivers along their routes. Beginning sometime during the first week of the strike, private guards were also used to transport employees to work. Bonanno arranged a shuttle for the protection of the approximately eighty production workers, most of whom were women, because these employees were being verbally and physically harrassed by pickets each day as they attempted to walk through the picket lines. Using Bonanno vehicles, guards would drive to designated locations, pick up the employees and transport them to the plant. The guards operated this shuttle until September, 1975.

The primary daytime activity of the guards changed after the attack on Richard Smith. Because of the attack and the continued threats and incidents of truck-following by pickets, drivers demanded more protection. Beginning on July 9, 1975, the day after the attack, Bonanno made arrangements through McLaren to have security guards accompany drivers along delivery routes. Typically, one guard would accompany each driver, although in situations where an additional guard was needed to protect both the driver and the truck, McLaren would supplement the escort service by functioning as a second guard himself. This escort service for drivers continued until March of 1976.

Beginning on June 27, 1975 and lasting until October 10, 1975, Bonanno also hired Medford police officers to control picket lines and protect the plant property. Between June 28, 1975 and August 22, 1975 Bonanno maintained at least two policemen on duty twenty-four hours a day. From August 25, 1975 until September 12, 1975 two police officers patrolled picket lines on weekdays from 6:00 a.m. until 6:00 p.m. On September 15, 1975 Bonanno decreased the patrol to one officer. Finally, beginning on October 6, 1975 and ending on

October 10, 1975, one policeman was on duty at Bonanno from 6:00 a.m. until 10:00 a.m. Thereafter, with one exception on December 12, 1975, Bonanno did not use police officers as part of its daily security arrangements at the plant. Instead, Bonanno maintained private security guards at the site on a twenty-four hour basis. This continued until July, 1976, at which time the use of guards was limited to weekends and weeknights.

Security at Bonanno during non-work hours changed over the course of the strike, consisting at different times of combinations of policemen, private guards, and dogs. In April, 1975, in anticipation of a likely strike and the possibility of violence, Bonanno completed the construction of a chain link fence on its property. The fence, together with the plant building, enclosed a yard where Bonanno parked its vehicles. Beginning in May, 1975 this enclosed area was patrolled during the evenings and on weekends by two yard dogs supplied by Guard Dogs, Inc. The dogs were brought to the yard by a handler, left unattended overnight, and removed from the yard the next morning. When the strike commenced and it was learned that the picketing would continue during the evenings, it was decided that the dogs should not be left in the yard unattended. This decision was made because of McLaren's concern for the safety of the dogs, and also because it was recognized that the dogs would not be able to protect the plant building from vandalism. Moreover, Bonanno was concerned with the possibility of violence because of disturbances that had occurred during a strike in 1972 against Bonanno by Local 25. For these reasons, McLaren assigned a security guard to patrol the plant along with the two yard dogs. On the second day of the strike nails were found strewn at the exit gate of the plant, and one night shortly thereafter a wire to the fire alarm system on the roof of the plant was cut. Because of these incidents, and the continual presence of pickets at night,

Bonanno increased its evening security. Additional guards were assigned to the plant and the yard dogs were replaced with attack dogs so that guards could move freely inside the yard itself.[4] This changed on June 27, 1975 when Medford police officers began to guard the plant during the evenings and on weekends. From June 28, 1975 until August 22, 1975, Bonanno ceased using both dogs and private guards at night, except on occasions when private guards were used to supplement the police personnel. After August 22, 1975, private guards accompanied by attack dogs, or in combination with yard dogs, once again became the usual method of providing evening security at the plant. Each day McLaren, in consultation with Bonanno management, would determine the number of guards to use that evening based on the size of the picket line and on whether there were reports of incidents of violence during the day. This method of protecting the plant property continued until April, 1977, at which time yard dogs without security guards were again used on weeknights. Finally, in July, 1977 Bonanno completely eliminated the use of private guards and returned to using yard dogs alone during evenings and weekends.

Almost all of the private security services during the strike were performed by Guard Dogs, Inc. and Gallant Security Service, a successor company that was owned and operated by McLaren. Occasionally, during the summer of 1975, McLaren subcontracted for additional guards from Investigators Services Bureau, Inc. and Wackenhut Corp., two independent security guard services. These companies would bill Bonanno directly for the additional guards provided. Many of the private security guards who were used during the strike

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[4] Unlike a yard dog, which is trained to attack automatically any intruder other than its handler, an attack dog is trained to attack only on command from the security guard.

were licensed to carry firearms. Shotguns were kept at the Bonanno plant for security purposes and were sometimes placed in trucks when guards accompanied drivers on delivery routes. In addition, guards who were licensed to carry handguns frequently did so when protecting the plant or escorting drivers. At no time during the strike, however, was a firearm discharged by a security guard, although on one occasion a guard used mace to subdue an attacking picket.

II.

In this action plaintiff seeks compensation from defendants for expenses incurred as a consequence of the violence that occurred during the strike. Plaintiff seeks compensation for the expense of providing police and private security guard protection at the plant (not including the cost of using guard dogs during evenings and weekends), and compensation for the expense of providing escorts for employees and substitute drivers. In addition, Bonanno seeks compensation for the cost of repairing trucks and plant property damaged during the strike, and for costs directly associated with the attack on Richard Smith, including medical expenses, towing charges, and the cost of replacing Smith's wrist watch, which was destroyed during the attack.

I find that Bonanno incurred the following expenses during the course of the strike:

Expenses for Plant Protection	
Medford Police (6-27-75 to 10-10-75; 12-12-75)	$34,628.00
Guard Dogs, Inc. (8-18-75 to 4-23-76)	21,915.00
Guard Dogs, Inc. and Gallant's Security Service (4-24-76 to 1-2-77)	23,984.12
Gallant's Security Service (1-3-77 to 7-10-77)	9,329.25

Expenses for Escort Services for Drivers and Employees	
Guard Dogs, Inc. (6-30-75 to 3-1-76)	35,632.14
Wackenhut Corp. and Investigators Services, Inc. (July to September 1975)	6,886.16[5]
Expenses for Assorted Private Security Services	
Guard Dogs, Inc. (6-23-75 to 6-27-75)	2,188.00[6]
Expenses Relating to the Attack on Richard Smith	
Cost of towing Smith's vehicle to Bonanno plant after the attack	31.00
Cost of replacing Smith's watch damaged during the attack	47.20
Medical care expenses	161.20
Expenses Relating to the Repair of Bonanno Trucks Damaged During the Strike	
Repair of 3 windshields (8-14-75 to 9-19-75)	199.90
Repair of 8 tires (8-5-75 to 9-11-75)	369.48
Repairs to front end of truck damaged during collision on 8-7-75	1,025.23
Service call to start truck (10-27-75)	28.20
Expenses for Repair of Plant Windows	
Assorted Windows (8-19-75 to 1-21-76)	113.41
Plate-glass window (2-20-76)	217.61

[5] From circumstantial evidence relating to the timing of payments to Wackenhut, and from findings discussed in part I *supra*, including findings that McLaren used guards from Wackenhut to supplement his own staff and that Wackenhut billed Bonanno directly for these services, I find that the payments indicated in Plaintiff's Exhibit 9 are entirely for escort services rendered by Wackenhut during the strike.

[6] During the first five days of the strike, guards working alone or with attack dogs performed all security services at the plant. These services included controlling the picket lines, escorting employees, and protecting the plant at night. The invoice of June 30, 1975, unlike all other invoices from Guard Dogs, Inc. (*see* Plaintiff's Exhibit 5), does not clearly distinguish between the different types of services provided.

I find that plaintiff incurred liability for expenses in the amounts stated above and that plaintiff paid all amounts in full.[7]

Plaintiff's right to recover any or all of these expenditures as damages against one or more defendants is discussed in the evaluative findings and conclusions of law in parts V and VI *infra*.

III.

I find that Gerald Halloran, the shop steward for Local 25 at Bonanno, acting individually or with other pickets, committed the following acts of violence: During the first week of the strike he vandalized the fire alarm system at the plant; on August 7, 1975 he knowingly assisted another picket in causing a collision with a Bonanno truck; on September 2, 1975 together with Peter Forrest, he participated in an incident at Simmons College in which a delivery truck was stoned; on the evening of September 20, 1975 he attacked Paul Simpson, a private security guard on duty at the plant; in September, 1975 together with Peter Forrest, he threatened John McBride with physical injury and attempted to lock McBride in a trailer at the plant; in January, 1976 he threw a lighted cigarette into a Bonanno truck containing inflammable linens; one afternoon during the spring of 1976, together with Peter Forrest,

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[7] Although Plaintiff's Exhibit 10 does not contain checks issued in payment for two invoices totaling $6690.00 from the Medford Police Department, I find circumstantially from the evidence submitted that plaintiff did pay these invoices. Accordingly, without reaching the merits of the dispute as to whether such checks were in fact submitted originally as part of Plaintiff's Exhibit 10, I deny plaintiff's Motion to Substitute Evidence. I also find that all invoices for private security guards, for which plaintiff did not submit corresponding checks, were paid by Bonanno.

Herbert Salter, and several other pickets, he participated in a rock-throwing incident at the plant; during the strike he frequently followed Bonanno trucks along delivery routes and participated in the threatening incidents involving Chivakos and Doherty (*see* part I *supra* at pp. 3-4); and on different occasions beginning as early as June 23, 1975 he personally threatened McLaren, Chivakos, Robert Orcione, Henry Trabucco, William Mungarten, and Charles Bonanno.

I find that Peter Forrest, a shop steward for Local 25 at another Association member company, acting individually or with other pickets, committed the following acts of violence in addition to those as to which it is stated immediately above that he participated: On one occasion he sprayed paint on a Bonanno vehicle; in September, 1975 he pushed a security guard who was passing through the picket line on a motorcycle; and on different occasions beginning as early as July 9, 1975 he personally threatened McLaren, Thomas Wetherbee, Richard Smith and David Holsberg.

I find that through January 2, 1977, Gerald Halloran and Peter Forrest by their acts and threats of violence, directly contributed to creating and prolonging Bonanno's need for plant protection and escort services. I also find that Gerald Halloran's actions during the incident on August 7, 1975 involving the collision with a Bonanno truck directly contributed to causing damage to the truck and the need for repair expenditures. Except for this specific incident of violence, however, I am unable to find that either Halloran or Forrest was personally involved in causing any of the other damage to property for which Bonanno incurred repair expenses, as identified as part II *supra* at p. 9. Similarly, I am unable to find that either defendant was personally involved in the attack on Richard Smith.

I am unable to find that defendants Arthur Moran, Jack Kerwin, John O'Malley, Ernest Zimmerman, Joseph Caico, or William McCarthy, acting individually or with other mem-

bers of Local 25, committed any acts of violence against Bonanno or its employees.[8]

From circumstantial evidence, however, I find that all acts of violence against Bonanno that were committed by unidentified persons during the strike, including the attack on Richard Smith, [illegible], in fact, committed by, or at the direction of, members of Local 25.

IV.

Herbert Salter, the field representative for Local 25, had primary responsibility during the strike for organizing and supervising the picketing at Bonanno. Salter visited the site once a day on most days and often mingled with pickets near

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[8] Pursuant to Fed. R. Civ. P. 65(a)(2), plaintiff offered in evidence testimony and affidavits presented during the hearings of August 12 and September 8, 1975 on the motion for a temporary restraining order. *See* Trial Transcript of October 30, 1981 at 6-69 to 6-78. At trial the court received the proffer but allowed counsel an opportunity to object by written submission "to any specific portions of that evidence." *Id.* at 6-78. In light of the post-trial submissions by counsel, I have excluded those portions of the proffer that contain statements or arguments of counsel. Also, for reasons explained at trial, I have received those portions of the proffer that relate to incidents of violence not involving Bonanno property or employees as bearing solely on the reasonableness of Bonanno's actions in attempting to protect its own property and employees. Other than those limited objections, which were raised either at trial or in post-trial submissions, defendants have identified no reason for excluding the otherwise relevant evidence offered in affidavit form or by live testimony at the hearings on the motion for a temporary restraining order. However, because most of the evidence in the proffer duplicates or parallels the testimony of witnesses at trial, I have found it unnecessary to rely on any portions of that evidence in making the findings of fact in parts I-IV of this opinion. Furthermore, in finding that defendant Joseph Caico committed no acts of violence against Bonanno employees or property, I have specifically rejected as insufficient proof of such acts of violence the affidavit testimony of Robert Orcione in light of his oral testimony at trial.

the gate to the plant. Salter was among the pickets on occasions when individuals were threatened (including the first day of the strike), when nails were strewn at the gate, and when trucks were followed, including the occasion on August 7, 1975 when a picket caused a collision with a Bonanno truck. Knowing that pickets sometimes engaged in acts of violence at delivery sites or along delivery routes, Salter nonetheless encouraged pickets to engage in ambulatory picketing during the strike. Also, in the spring of 1976, Salter personally participated in a rock-throwing incident at the plant. That day Charles Bonanno, who saw Salter with Halloran, Forrest, and other pickets strolling around the perimeter of the property at the time of the incident, confronted Salter about the violence, to which Salter replied, "Rocks are nothing compared to what you are gonna get."

I find that throughout the strike Salter knew about the recurring incidents of violence and threats of violence by members of Local 25, that Salter had the authority and the power to stop the violence, and that Salter intentionally failed to act. At no time did Salter remove a picket from the picket line or deprive a picket of strike benefits for having engaged in acts of violence. Rather, with knowledge that acts of violence were occurring, Salter allowed pickets to issue threats in his presence, endorsed the use of ambulatory picketing, and personally participated in at least one overt act of violence. Accordingly, I find that Salter, acting in his official capacity on behalf of Local 25, ratified or authorized all acts of violence by members of Local 25 during the strike.[9] I am unable to find

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[9] In finding ratification and authorization on the part of Herbert Salter I do not rely on the proffered hearsay testimony of Thomas Wetherbee, which was excluded at trial. *See* Trial Transcript of September 24, 1981 at 151-57. This testimony concerned statements by Eddie Patelli [Battelli], a member of Local 25 who is not named as a defendant in this action. *See id.* at 154. Initially, the court excluded the evidence as against both the individual de-

that Salter individually participated in any of the specific acts of violence for which Bonanno incurred repair expenses, as identified in part II *supra* at 9, or that Salter was personally involved in the attack on Richard Smith. I find, however, that between June 23, 1975 and January 2, 1977 Salter, both individually and as an official on behalf of Local 25, personally contributed to creating and prolonging Bonanno's need for plant protection and escort services.

V.

Defendants contend that under state law there exists no claim upon which relief may be granted in this action, that if such a claim does exist plaintiff had failed to identify the claim adequately, and that in any event, this court lacks jurisdiction to adjudicate the claim.

Plaintiff commenced this action on August 7, 1975 in Suffolk Superior Court. The complaint, which was filed on that

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fendants and Local 25. After a brief colloquy with counsel concerning the admissibility of the evidence under Fed. R. Evid. 801(d)(2)(d) as against defendants Local 25 and Herbert Salter (in his official capacity), the court adhered to its ruling to exclude the evidence, but added the following caveat:

> I invite you both to be prepared to present cases to me if there are any on this subject and if after checking it further plaintiff's counsel wishes to move for reconsideration of the ruling I will hear you.

Trial Transcript of September 24, 1981 at 157. At no time during the trial, which did not conclude until October 30, 1981, did plaintiff move for reconsideration. Long after the close of evidence, however, in its Brief on Behalf of Plaintiff [Bonanno] at 20, plaintiff now moves to reconsider the ruling. In light of plaintiff's unexcused delay in moving for reconsideration, and light of the unfairness that would result from having precluded defendants from presenting rebuttal evidence on this matter, I deny plaintiffs motion to reconsider. Moreover, because of the likelihood of unfair prejudice to defendants, who may have relied on the court's evidentiary ruling concerning Whetherbee's oral testimony, I have specifically not relied on the similar testimony of Whetherbee by affidavit that was offered in evidence from the hearings on the motion for a temporary restraining order. *See* note 8 *supra*.

date, requests compensatory and injunctive relief, but does not identify by name or statute the precise legal claims upon which relief may be granted. On August 11, 1975 defendant removed to federal court on the theory that plaintiff was alleging an illegal secondary boycott as defined by 29 U.S.C. § 158(b)(4). In issuing a temporary restraining order on September 8, 1975, this court acknowledged its jurisdiction under 29 U.S.C. § 187 and also recognized the existence of pendent jurisdiction to adjudicate state law claims relating to defendants' unlawful use of violence. *See* Temporary Restraining Order of September 8, 1975 at ¶1. Some time after preliminary relief was granted, but before this action came on for trial, it became clear that a claim under 29 U.S.C. §§ 158(b)(4) and 187 could not be proved. Nonetheless, for reasons discussed in the court's Memorandum and Order of September 30, 1980, this court retained jurisdiction to adjudicate the pendent state law claims.

A.

The initial question to consider is whether plaintiff has stated a valid pendent state law claim against these defendants.

In their post-trial brief defendants argue, for the first time, that they have been prejudiced by plaintiff's failure to identify with greater specificity the state law claims upon which relief may be granted, and, therefore, that judgment should enter for defendants. Defendants' argument is without merit. The pleadings, the hearings on preliminary relief, and the subsequent proceedings in this court leading to trial adequately placed defendants on notice of the substance of plaintiff's claims. Plaintiff has alleged that during an otherwise lawful strike individual members of Local 25 committed tortious acts of violence against the property and employees of Bonanno, and that these tortious acts were authorized or ratified by

Local 25. In substance, plaintiff has pleaded intentional and unprivileged infliction of economic harm by defendants during an otherwise privileged course of conduct. That plaintiff failed to identify these claims with greater specificity as common law claims for assault, battery, trespass, and intentional interference with advantageous business relations is unimportant. The substance of the claims is adequately identified in the pleadings, and defendants have had a full opportunity to use discovery procedures to clarify any ambiguities that may exist in the pleadings. In these circumstances, there is no reason to require plaintiff to use formal labels in identifying its state law claims.

Of course, this court will not create claims or theories of liability on behalf of plaintiff. Plaintiff has neither pleaded nor argued that the individual defendants or defendant Local 25 participated in a conspiracy to harm Bonanno. As to the individual defendants, therefore, tort liability will be limited to the consequences of specific acts of violence committed by that individual acting either alone or with others as a joint tortfeasor. Similarly, defendant Local 25 will be held liable for the consequence of acts of violence committed by members of Local 25 only to the extent that such acts were authorized or ratified by Local 25.

I conclude that the pleadings, construed in this manner, state a valid cause of action for damages under Massachusetts common law against the individual defendants and defendant Local 25.[10] The courts of Massachusetts have long recognized the right of a business to recover damages for the harm caused by an unlawful strike. *See, e.g., Quinton's Market* v. *Patter-*

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[10]The Supreme Judicial Court of Massachusetts recently determined that a union may be named as a defendant in tort action for damages. *See Diluzio* v. *United Electrical, Radio, and Machine Workers of America, Local 274*, 386 Mass. 364 (1982).

son, 303 Mass. 315, 21 N.E.2d 546 (1939). It follows that Massachusetts courts would also recognize an employer's right to recover damages for the harm caused by unlawful or violent conduct during a lawful strike. Permitting such an action for damages is consistent with general principles of tort law, and with the framework for state and federal regulation of labor disputes. It also accords with similar approaches taken in other jurisdictions. *See, e.g., Kayser-Roth Corp.* v. *Textile Worker Union of America*, 479 F.2d 524 (6th Cir.) (applying Tennessee law), *cert. denied*, 414 U.S. 976 (1973).

Plaintiff failed to prove that Local 25 engaged in an illegal secondary boycott as defined by 29 U.S.C. § 158(b)(4). Plaintiff presented evidence of primary location picketing that affected third-party neutrals, and evidence of ambulatory picketing at the work-sites of third-party neutrals. The evidence, however, does not establish that Local 25 engaged in such activities for purposes prohibited by 29 U.S.C. § 158(b)(4).

(1) *Pendent-claim Jurisdiction*

Defendant Local 25 contends that since plaintiff failed to establish its federal claim under 29 U.S.C. §§ 187 and 158(b)(4), this court lacks jurisdiction to decide the pendent state law claims described in part V-A *supra*.

First, I conclude that this court has the power to exercise jurisdiction over these pendent state law claims. The state and federal claims "derive from a common nucleus of operative fact," and "plaintiff's claims are such that [it] would ordinarily be expected to try them in one judicial proceeding." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 735 (1966). Furthermore, the evidence presented at trial, although insufficient to establish a claim under 29 U.S.C. §§ 187 and 158(b)(4), confirmed the correctness of the court's previous

determination that the federal claim was "substantial" when defendants removed the action to federal court.[11] *See* Memorandum and Order of September 8, 1975 at 4-5. It follows, therefore, that this court has power to exercise jurisdiction in this action, a conclusion that is implicit in the First Circuit's affirmance of Judge Tauro's temporary injunction.[12]

In addition, for the same reasons that this court denied defendant's motion to remand in September, 1980, I conclude that, as a matter of discretion, it is appropriate to exercise that jurisdictional power and to decide the pendent state law claims raised in this action. *See id.* at 6.[13]

(2) *Pendent-party Jurisdiction.*

The individual defendants contend that even if this court does have jurisdiction to decide the pendent state law claims against Local 25, this court has no jurisdiction to adjudicate the state law claims against individual members of Local 25, since plaintiff's federal claim does not apply to these defendants. Defendants rely on *Owen Equipment & Erection Co.* v.

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[11] For the purpose of determining this court's *power* to exercise jurisdiction, "substantiality" must be determined as of the time of removal. However, even if I were to evaluate the substantiality of the claim as of a later time — either at the commencement of the trial or at the close of evidence — I would still conclude, on the evidence presented in this case, that plaintiff's federal claim was neither frivolous nor obviously without merit.

[12] *See* note 3 *supra*.

[13] As previously noted, *defendants* removed this action to federal court. Because I have concluded that it is appropriate in the exercise of discretion to decide the pendent state law claims in this action, I need not consider whether defendants should be barred under a theory of estoppel from raising at this late date an issue that, though often referred to as "jurisdictional," is one involving a discretionary determination in circumstances in which power to exercise jurisdiction is established.

Kroger, 437 U.S. 365 (1978) and *Federal Deposit Insurance Corp.* v. *Otero*, 598 F.2d 627 (1st Cir. 1979) as support for their argument that pendent-party jurisdiction may not be asserted in the circumstances of this case.

Relying originally on *Aldinger* v. *Howard*, 427 U.S. 1 (1976), defendants raised this same jurisdictional claim in a motion to dismiss, filed with the court on September 23, 1981, the day before trial commenced. On the morning of trial, following arguments by counsel, this court denied defendants' motion to dismiss. *See* Trial Transcript of September 24, 1981 at 3-12. For the same reasons offered then, I conclude now that it is appropriate to exercise pendent-party jurisdiction in this case. First, applying the guidelines of *United Mine Workers* v. *Gibbs*, 383 U.S. at 735, I conclude that this court has the power under Article III of the Constitution to decide the claims against these individual defendants. *See Otero*, 598 F.2d at 631 ("As with *Aldinger*, *Kroger* instructs us to answer the preliminary question of potential Article III jurisdiction by applying the standard enunciated in [*Gibbs*]"). Second, I conclude that there is no express or implied Congressional intent in the jurisdictional granting statute to "limit the sweep of potential Article III jurisdiction," *Otero*, 598 F.2d at 631. The jurisdictional granting statute, 29 U.S.C. § 187(b), is broadly worded to permit any plaintiff to bring an action in federal district court if that plaintiff has been injured in business or property by the conduct of a labor organization, and if the injurious conduct is an unfair labor practice under 29 U.S.C. § 158(b)(4). Nothing in the statute suggests that Congress intended otherwise to limit a federal district court's power to decide closely related claims by the same plaintiff against parties who are not labor organizations.[14] Finally, upon

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[14] 29 U.S.C. § 187 provides:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to

weighing numerous factors bearing on judicial economy, convenience, and fairness, I conclude that it is appropriate in the circumstances of this case to exercise jurisdiction. These factors, which were identified in full at trial (*see* Trial Transcript of September 24, 1981 at 10-12), weigh strongly in favor of exercising jurisdiction to decide the state law claims brought against these individual defendants.[15] Contrary to defendants' contention, I find nothing in either *Kroger* or *Otero* that requires a different result on the facts of this case.

VI.

I find that all of the expenses incurred by Bonanno between June 23, 1975 and January 2, 1977, part II *supra*, were reasonable. I find that the expenditures for plant protection and escort services were incurred to minimize property damage and personal injury to employees, that Bonanno (through its agents, Charles Bonanno, Kevin Finnerty, and Joseph Finnerty) had a reasonable belief that the expenditures between June 23, 1975 and January 2, 1977 were necessary to prevent acts of violence by members of Local 25, and that but for these expenditures Bonanno would have suffered substan-

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engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason [of] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title, without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

[15] As with the pendent-claim issue by defendant union, I need not decide whether the individual defendants, who together with Local 25 petitioned for removal to federal court, should be barred under a theory of estoppel from raising the pendent-party issue. *See* note 13 *supra*.

tial losses from other acts of violence by members of Local 25. Because I have found no acts or threats of violence after January 2, 1977, however, I am unable to find that the expenditures for plant security after January 2, 1977 were reasonably incurred to avoid damage from threatened violence. The last occasion when pickets were seen at the Bonanno plant site at night was in November, 1976. Threats of violence also last occurred in November, 1976. Plaintiff reasonably continued to incur expenses for special plant protection through the Christmas and New Year's holiday periods immediately following November, 1976, but I cannot find that expenses for special plant protection after January 2, 1977 were reasonably incurred to protect against threats of violence by any of the defendants in this case.

I find that between June 27, 1975 and August 22, 1975, during which time Bonnano used Medford Police officers to guard the plant on weeknights and weekends, Bonanno benefited from the elimination of guard dog services in the amount of $1200.00 (eight weeks @ $150.00 per week). Expenses for the use of guard dogs on weeknights and weekends after August 23, 1975 are not recoverable in this action since Bonanno wold have incurred these expenditures even if defendants had not engaged in acts of violence.

Based on the findings of fact stated in parts I-III *supra*, I conclude that Gerald Halloran is liable to Bonanno in the amount of $124,908.65, which amount represents all economic harm to Bonanno (less amounts saved) that was caused by Halloran's individual conduct. I conclude that Halloran's violent conduct, which commenced on June 23, 1975, was a legal cause of all expenses incurred by Bonanno in providing plant protection and escort services through January

2, 1977. In addition to the pre-1977 security services,[16] Halloran is liable for repair expenditures that resulted directly from his own conduct. Halloran's liability is calculated as follows:

Plant Protection	
Medford Police	$34,268.00
Guard Dogs, Inc., and Gallant's Security (8-18-75 to 1-2-77)	45,899.12
Less Benefit from Elimination of Yard Dogs (6-27-75 to 8-22-75)	(1,200.00)
Escort Services	
Guard Dogs, Inc.	35,632.14
Wackenhut Corp. and Investigators Services, Inc.	6,886.16
Assorted Private Security Services	
Guard Dogs, Inc. (6-23-75 to 6-27-75)	2,038.00[17]
Repair Expenses	
Truck Collision Repairs	1,025.23
TOTAL	$124,908.65

[16] Since Bonanno's expenditures for plant security after January 2, 1977 were not reasonably incurred to avoid harm from threatened violence, Halloran's conduct is not a legal cause of this economic harm.

[17] The invoice of June 30, 1975 from Guard Dogs, Inc. does not distinguish clearly between the various security services provided during the first week of the strike. *See* note 6 *supra*. The invoice indicates that $1,375.50 is charged for "Escort hrs. @ $5.25," and that $812.50 is charged for "K-9 hrs. @ $6.50." I have reduced the total recoverable amount by $150.00, which is the amount that Bonanno would have paid for yard dog services even if the violence had not occurred during the strike. Accordingly, there is no need to determine the precise meaning of the categories of services represented by charges on the June 30, 1975 invoice. All expenditures for security services in excess of $150.00 during the period of June 23, 1975 and June 27, 1975 were caused by the acts of violence or threats of violence by defendants.

Based on the findings of fact stated in parts I-III *supra*, I conclude that Peter Forrest is liable to Bonanno in the amount of $116,525.42. This amount reflects all reasonable expenditures for plant security and escort services (less amounts saved) incurred by Bonanno between July 9, 1975 and January 2, 1977,[18] calculated as follows:

Plant Protection	
Medford Police (7-9-75 to 10-10-75; 12-12-75)	$29,008.00
Guard Dogs, Inc., and Gallant's Security Service (8-18-75 to 1-2-77)	45,899.12
Less Benefit from Elimination of Yard Dogs (7-9-75 to 8-22-75)	(900.00)
Escort Services	
Guard Dogs, Inc.	35,632.14
Wackenhut Corp. and Investigators Services, Inc.	6,886.16
TOTAL	$116,525.42

Since I am unable to find that defendants Moran, Kerwin, O'Malley, Zimmerman, Caico, or McCarthy committed any acts of violence against Bonanno or its employees, judgment will enter for these individual defendants.

I have determined from clear proof that Herbert Salter, in his official capacity as field representative for Local 25, authorized or ratified all acts of violence against Bonanno by members of Local 25. In addition, I have determined that all

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[18] I conclude that Forrest's violent conduct during this period of time was a legal cause of the expenditures for security services by Bonanno. Forrest may not be held liable for expenses incurred before July 9, 1975, which is the earliest date involving acts of violence by Forrest, or for expenditures incurred by Bonanno after January 2, 1977.

acts of violence against Bonanno, including those acts by unidentified individuals, were committed by, or at the direction of, members of Local 25. Based on these findings and other findings concerning the reasonableness of Bonanno's expenditures, I conclude that Local 25 (by the conduct of its authorized agent) is liable to Bonanno in the amount of $126,076.65. This amount reflects all reasonable expenditures (less amounts saved) incurred by Bonanno during the strike that were caused by authorized or ratified acts of violence by members of Local 25. The amount is calculated as follows:

Plant Protection	
Medford Police	$34,628.00
Guard Dogs, Inc., and Gallant's Security Service (8-18-75 to 1-2-77)	45,899.12
Less Benefit from Elimination of Yard Dogs (6-27-75 to 8-22-75)	(1,200.00)
Escort Services	
Guard Dogs, Inc.	35,632.14
Wackenhut Corp. and Investigators Services, Inc.	6,886.16
Assorted Private Security Services	
Guard Dogs, Inc. (6-23-75 to 6-27-75)	2,038.00[19]
Attack on Richard Smith	
All Expenses	239.40
Repair of Bonanno Trucks	
All Expenses	1,622.81
Repair of Plant Windows	
All Expenses	331.02
TOTAL	$126,076.65

[19] See note 17 *supra*.

I also conclude that Herbert Salter is individually liable in the amount of $123,883.42. This amount reflects all reasonable expenditures for plant security and escort services (less amounts saved) incurred by Bonanno between June 23, 1975 and January 2, 1977, calculated as follows:

Plant Protection	
Medford Police	$34,628.00
Guard Dogs, Inc., and Gallant's Security Service (8-18-75 to 1-2-77)	45,899.12
Less Benefit from Elimination of Yard Dogs (6-27-75 to 8-22-75)	(1,200.00)
Escort Services	
Guard Dogs, Inc.	35,632.14
Wackenhut Corp. and Investigators Services, Inc.	6,886.16
Assorted Private Security Services	
Guard Dogs, Inc. (6-23-75 to 6-27-75)	2,038.00[20]
TOTAL	$123,883.42

I conclude that Salter, unlike the other individual defendants, had a personal duty during the strike to take reasonable steps to prevent acts and threats of violence by members of Local 25. This duty arose both from his relationship to the parties and from his express assurances to this court on August 12, 1975 that he would control the pickets.[21] Having determined that Salter had both the power and the opportunity to control the pickets, I conclude that his deliberate failure to act constituted a personal breach of that duty. I conclude, therefore, that Salter's conduct (both his inaction and his actions during the

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[20] *See* note 17 *supra*.

[21] *See* Excerpt of Transcript of August 12, 1975 at 3-5.

rock-throwing incident in the spring of 1976) is a legal cause of all expenses incurred by Bonanno through January 2, 1977 in protecting employees and property from violence by members of Local 25. Salter's liability is based solely on this breach of duty and not on his ratification of acts of violence by others or on a theory of agent-subagent vicarious liability.

In concluding that Bonanno is entitled to recover its expenditures for private security guards through January 2, 1977, I reject defendants' two principal legal arguments. First, defendants argue that security guards sometimes carried firearms when escorting substitute drivers during the strike in violation of Mass. Gen. Laws Ann. ch. 147, § 30, and, therefore, that it would violate public policy to allow plaintiff to recover for expenditures associated with this "criminal conduct." Post-trial Memorandum of [Defendants] at 27. Second, defendants argue that as of April 23, 1976, at which time Local 25 and the Association signed a new collective bargaining agreement, Bonanno prolonged the picketing, and thereby prolonged the need for security guards by committing an unfair labor practice in failing to honor the new contract. *See* note 2 *supra*.

First, even assuming that the security guards were in violation of Massachusetts law in carrying firearms during this labor strike, I conclude that there is no relationship between the unlawful conduct of the security guards and the claims for damages by plaintiff in this action. The carrying of firearms by security guards neither caused defendants' tortious conduct, nor caused Bonanno to incur additional expenses during the strike. In this action for damages by Bonanno, no public policy would be served by excusing defendants from the consequences of their wrongful conduct because of the unrelated wrongful conduct of the security guards.[22] Similarly, I con-

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[22] Defendants also argue that plaintiff violated the public policies of Mass. Gen. Laws Ann. ch. 149, § 23A in hiring armed guards during the labor dispute. I conclude that defendants have the burden of proving that plain-

clude that defendants did not become privileged to use violence against Bonanno by virtue of the unfair labor practice committed by plaintiff. As a matter of sound labor policy and as a principle of legal causation in tort law, the unfair labor practice cannot be viewed as an intervening event that relieves defendant of liability for the consequences of their intentional acts of violence. *See Kayser-Roth Corp.*, 479 F.2d at 528.

VII.

For the reasons stated in this opinion, judgment will enter as follows:

(1) Judgment for defendants William McCarthy, Arthur Moran, Jack Kerwin, John O'Malley, Ernest Zimmerman, and Joseph Caico;

(2) Judgment for plaintiff against Local 25, Gerald Halloran, Herbert Salter, and Peter Forrest, jointly and severally, for security expenses in the amount of $116,525.42;

(3) Judgment for plaintiff against Local 25, Gerald Halloran, and Herbert Salter, jointly and severally, for security expenses in the amount of $7358.00, in addition to the amount stated in paragraph (2);

(4) Judgment for plaintiff against Local 25 and Gerald Halloran, jointly and severally, for repair expenses in the amount of $1025.23, in addition to the amounts stated in paragraphs (2) and (3);

(5) Judgment for plaintiff against Local 25 for repair expenses and expenses arising from the attack on Richard Smith in the amount of $1168.00, in addition to the amounts stated in paragraphs (2), (3) and (4).

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tiff's conduct violates this statute and defendants failed to prove that the guards used by Bonnano were not "persons licensed under sections twenty-three to thirty, inclusive, of chapter one hundred and forty-seven or employees of such licensees." *Id.*

Plaintiff shall have interest and costs in accordance with applicable laws. Counsel will confer with the clerk forthwith and, if unable to agree on amounts due as interest and costs, will file written submissions within 14 days of entry of this opinion.

Robert E. Keeton
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHARLES D. BONANNO LINEN SERVICE, INC., *et al.*, Plaintiffs	)	
v.	)	CIVIL ACTION NO. 75-3313-K
WILLIAM J. McCARTHY, *et al.*, Defendants	)	

July 29, 1982
Supplement to Opinion of June 30, 1982

Having determined that judgment should be entered for plaintiff in accordance with the Opinion filed June 30, 1982, the court directed that the parties confer with the clerk to determine whether agreement could be reached regarding pre-judgment interest. The parties have reported agreement as to the applicable rate of interest — eight per cent (8%) — but disagreement in other respects.

Plaintiff claims, in the entire sum awarded, interest at eight per cent (8%) per annum "from the date of commencement of the action" as provided by Mass. Gen. Laws ch. 231, § 6B, until the judgment is satisfied. Defendants challenge plaintiffs' claim to interest on two grounds.

I.

First, acknowledging that interest should be awarded from the date of commencement of the action as to damages award-

ed for losses incurred before commencement of the action, defendants contend that ch. 231, § 6B does not apply to damages for losses accruing after commencement of the action and that as to damages for these losses the common law rule denying prejudgment interest should be applied. *See, e.g., D'Amico* v. *Cariglia*, 330 Mass. 246, 247, 112 N.E.2d 807, 808 (1953).

Defendants argue that there is no indication that the legislature considered the issue raised by losses accruing after commencement of a tort action, that they have found no Massachusetts court decision addressing this issue, that literal application of the statute in this context would provide plaintiff with a windfall, and that in these circumstances this court should allow no interest on damages for losses accruing after commencement of this action.

I conclude, however, that even if the Supreme Judicial Court of Massachusetts were to determine, as defendants contend, that the legislature did not address the issue presented here, it would decide this issue in the way it found most compatible with ch. 231, § 6B rather than applying to this issue the common law rule that the statute abrogated. The Supreme Judicial Court has declared that when the text of a statute does not answer a question, the court nevertheless takes into account the sense of the legislature as a whole in fashioning a rule on the question that the text of the statute leaves unanswered. *Mailhot* v. *Travelers Insurance Co.*, 375 Mass. 342, 348, 377 N.E.2d 681, 684 (1978). Legislative establishment of policy carries significance beyond the scope of the specific mandates of statutes. *Gaudette* v. *Webb*, 362 Mass. 60, 70, 284 N.E.2d 222, 229 (1972).

It seems most likely that the Supreme Judicial Court would conclude that pre-judgment interest should be awarded on the entire judgment, from the date of commencement of the action of the date of entry of the judgment. One may view the

the legislature's choice of the date of commencement of the action as a reasonable accommodation of competing interests. On the one hand, it fails to redress loss fully because it does not provide interest or any alternative form of compensation for delay in payment between the date earlier losses were incurred and the date of commencement of the action. On the other hand, it causes interest to be calculated from a date preceding losses accruing after the action is commenced. Thus, a "shortfall" in one respect is counterbalanced by a "windfall" in another respect. The legislature is free, of course, to provide for such an accommodation, and especially so when, as in the calculation of pre-judgment interest, there is value in having a fixed rule for mathematically calculable interest to avoid the costs and delays incident to disputes over details such as might be presented here if interest were awarded separately on many elements of damages from many different dates of accrual. Moreover, bearing in mind the reasonableness of such a legislative accommodation, one may be skeptical of the assertion that the legislature did not consider this issue. It is unlikely indeed that, in providing for pre-judgment interest on tort awards, the legislature would have failed to consider the fact that many tort judgments make lump-sum awards based on present value of losses to accrue not merely after commencement of the action but even after entry of the judgment. Especially in light of the statutory directive that the clerk add interest — a directive from which one may infer that the statutory rule of entitlement was meant to be fixed and calculable without any need for factfinding regarding dates of accrual of separate elements of damages — it is more reasonable to read the legislative prescription as one applying to all tort damages, whether for losses accruing before or for losses accruing after the date of commencement of the action. This conclusion is supported as well by analogy to the issue decided in *Carey* v. *General Motors Corp.*, 377

Mass. 736, 387 N.E.2d 583 (1979). The jury verdict in that case included an amount for future loss of earning capacity.[1] The Supreme Judicial Court declared: "The interest was thereafter correctly calculated on the entire verdict as unequivocally required by the statute, G.L.C. 231, § 13." 377 Mass. at 746, 387, N.E.2d at 589. I am guided by the opinion in *Carey* as the most recent expression of the Supreme Judicial Court bearing on this issue.[2]

I conclude that applicable Massachusetts law requires that interest on the entire judgment be awarded from the date of commencement of the action.

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[1] Referring to the issue in *Carey* as one analogous to the issue here may even be understating the force of *Carey* as precedent here. Since the verdict in *Carey* was said explicitly to have included damages for future loss of earning capacity, it is most likely that it included damages for loss of earnings after commencement of the action and before judgment. Thus it is likely that the issue presented here was also present in *Carey*, even though not explicitly discussed.

[2] *Jet Spray Cooler, Inc.* v. *Crampton*, 377 Mass. 159, 182 n.21, 385 N.E.2d 1349, 1362 n.21 (1979) would seem to suggest a different interpretation of ch. 231 § 6: "These statutes [ch. 231 & 6B and 6C] were not intended to award interest on damages accruing after the filing of this action, assuming that such interest is not actually an element of the damage itself." This observation was made, however, as a footnote to a reference to the separate statutory mandate, Mass. Gen. Laws c. 235, § 8, regarding interest on an award based on the report of a master. The issue before the court in *Jet Spray* was thus controlled by a separate statute that is inapplicable to the issue now under consideration. *Jet Spray* is also distinguishable from the present case in that the monetary award in question there was based on defendant's net profits rather than plaintiff's loss. The court, in text immediately following footnote 21, adverted to "considerations of relative hardship" and to the fact that in an award to a plaintiff based on a defendant's profits "the plaintiff may actually recover far more than its actual loss." 377 Mass. at 182, 385 N.E.2d at 1363. There is no reason to think in the present case that the damage award exceeds plaintiff's loss, or that a calculation of interest accruing from the time the action was commenced and an addition of that interest to the damages will produce a sum exceeding the plaintiff's loss.

II.

Defendants contend, secondly, that pre-judgment interest should not be awarded beyond January, 1979 — at which time a notice of potential dismissal for want of prosecution was issued by the clerk under the direction of the court. Defendants appear to make an alternative argument that interest should be denied for the period January, 1980, to April, 1980, during which a conference on the case was postponed because of unavailability of plaintiff's counsel. These contentions must be denied for two independent reasons. First, the law of Massachusetts, which governs the claim for pre-judgment interest, contains no such qualification or condition as defendants advance here. The statute, as *Carey* observes in another context, "unequivocally" provides for interest from commencement of the action to the date of judgment. 377 Mass. at 746, 387 N.E.2d at 589. Second, I find no factual basis for imposing a sanction against the plaintiff because of any delay between commencement of this action and disposition. Close examination of the history of this case reveals delays for a variety of reasons, among which were the heavy caseload of the court and the pendency of another controversy between the parties, which was thought possibly to have a bearing on this case and which was finally resolved by the Supreme Court of the United States after trial of this case was commenced. I find that plaintiff has not delayed the final disposition of this case.

III.

Plaintiff claims that interest at the rate of eight per cent (8%) per annum should continue to accrue until the judgment is actually satisfied. Although plaintiff is apparently relying on ch. 231, § 6B for its claim of interest at the specified rate ac-

cruing beyond the date on which judgment was entered, ch. 231, § 6B applies only to that period from the date of commencement to the date on which judgment is entered.[3] Once the clerk of court adds interest to the amount of the judgment, this full sum itself then bears interest as specified by 28 U.S.C. § 1961 and Mass. Gen. Laws ch. 235 § 8, *see Boston Edison Company* v. *Tritsch*, 370 Mass. 260, 263, 346 N.E.2d 901, 903 (1976). This latter interest is, of course, not pre-judgment interest — the subject that the parties were asked to address — but is properly characterized as interest on the judgment. In entering judgment, the clerk need not make any calculation of interest on the judgment.

For the foregoing reasons, it is ORDERED:

Plaintiff shall recover pre-judgment interest on the entire judgment at eight per cent (8%) per annum from the date of commencement of the action to the date of entry of judgment. The clerk shall enter final judgment forthwith.

Robert E. Keeton
United States District Judge

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[3] Chapter 231 § 6B directs the clerk of court to add interest to the amount of damages specified in the verdict, finding or judgment, with interest calculated from the date of the commencement of the action. It contains no instruction to the court to impose interest for any period after the judgment, finding or verdict is entered.

Appendix D.

28 U.S.C. § 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

29 U.S.C. § 158. Unfair Labor Practices

. . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

. . .

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture,

process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution; . . . .

29 U.S.C. § 187. Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

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[1] So in original. Probably should read "of".